

N. 2941

No. 14795

United States
Court of Appeals
for the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation, Appellant,
vs.
ERNEST EVERETT, Appellee.

Transcript of Record

In Two Volumes

VOLUME I.

(Pages 1 to 282, inclusive)

Appeal from the United States District Court for the Eastern
District of Washington, Northern Division

FILED

DEC - 1 1955

PAUL P. O'BRIEN, CLERK

No. 14795

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Answer	9
Appeal:	
Bond on	28
Certificate of Clerk to Transcript of Record on	33
Designation of Record on (DC).....	31
Designation of Record on (USCA).....	548
Notice of	27
Order Extending Time to File and Docket Record on	30
Statement of Points on (USCA).....	540
Supplemental Designation of Record on (DC)	32
Bond on Appeal	28
Certificate of Clerk to Transcript of Record...	33
Complaint	3
Designation of Record on Appeal (DC).....	31
Supplemental	32
Designation of Record on Appeal (USCA)....	548

Instructions Requested by Defendant, Nos. 8 and 10	13, 14
Judgment on Jury Verdict	15
Motion to Set Aside Verdict and Judgment or in the Alternative for a New Trial.....	16
Names and Addresses of Attorneys.....	1
Notice of Appeal	27
Order Denying Motion to Set Aside Verdict and Judgment or in the Alternative for a New Trial	26
Order Extending Time to File and Docket Rec- ord on Appeal	30
Reply	12
Statement of Points to be Relied Upon on Ap- peal (USCA)	540
Supplemental Designation of Record (DC)....	32
Transcript of Proceedings and Testimony.....	35
Instructions to the Jury	518
Motions of Defendant at Close of Plaintiff's Testimony	353
Ruling on	365
Motions of Defendant at Close of All Testi- mony	481
Ruling on	510
Ruling on Motion to Set Aside Verdict and Judgment Thereon and in the Alternative for a New Trial—Denied	538

Transcript of Proceedings—(Continued)

Witnesses:

Adams, Walter R.

—direct (Etter)	42
—cross (McKevitt)	54
—redirect (Etter)	59
—recross (McKevitt)	62

Everett, Ernest

—direct (Etter)	63, 91
—voir dire (McKevitt).....	85
—cross (McKevitt)	109, 129
—redirect (Etter)	167
—recross (McKevitt)	168
—rebuttal, direct (Etter).....	474
—cross (McKevitt)	475

Everett, Rena

—direct (Etter)	328
—cross (McKevitt)	338
—redirect (Etter)	347

Gaynor, Joseph F. N.

—direct (McKevitt)	429
—voir dire (Etter).....	458
—direct (McKevitt)	460
—cross (Etter)	463
—recalled, cross (Etter).....	477
—redirect (McKevitt)	479
—recross (Etter)	479

Transcript of Proceedings—(Continued)

Witnesses—(Continued)

Klocke, Lee

—direct (Etter)	170
—cross (McKevitt)	189
—direct (McKevitt)	196
—direct (Etter)	200

Nurre, Evelyn

—direct (McKevitt)	367
—cross (Etter)	373
—redirect (McKevitt)	377

O'Neill, John J.

—direct (Connelly)	280
—cross (McKevitt)	296

O'Neill, Lawrence Shaw

—direct (Connelly)	300
—cross (McKevitt)	314
—redirect (Connelly)	321

Scobee, Francis William

—direct (Etter)	202
—direct (McKevitt)	378
—cross (Etter)	387
—redirect (McKevitt)	413

Williams, Harvey Glenn

—direct (McKevitt)	414
—cross (Etter)	420

Verdict	15
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In the United States District Court for the Eastern
District of Washington, Northern Division

No. 1197

ERNEST EVERETT,
vs.

Plaintiff,

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation, and F. W. SCOBEE,
Defendants.

COMPLAINT

Plaintiff alleges:

I.

That plaintiff is the father of Erna Mae Everett, deceased, and that the said Erna Mae Everett, deceased, was, at the time of her death, of the age of sixteen years and resided with and was a member of the household of said plaintiff and his wife; that until receiving the injuries hereinafter described, said Erna Mae Everett, deceased, was in good physical and mental health.

II.

That the defendant, Northern Pacific Railway Company, now is and at all times herein mentioned has been, a corporation organized and existing under and by virtue of the laws of the State of Minnesota, and as such operates lines of railroad in the State of Minnesota, and other states, and in the State of Washington, hauling freight and passengers thereon as a common carrier for hire.

III.

That in the matters herein alleged, defendant, F. W. Scobee, acted as agent and employee of the defendant, Northern Pacific Railway Company, and defendant, F. W. Scobee, was the engineer of the train hereinafter mentioned, and in the matters hereinafter alleged, defendant, F. W. Scobee, acted wholly within the scope of his employment and authority as agent of the defendant, Northern Pacific Railway Company.

IV.

That at all times herein mentioned, defendant, Northern Pacific Railroad Company, owned, controlled, maintained and operated a railroad in the vicinity of the City of Ellensburg in Kittitas County, State of Washington; that in said vicinity and within said Kittitas County, a portion of said railway of said Northern Pacific Railway Company's track and right-of-way extend in a general easterly and westerly direction and intersects by way of a public crossing likewise owned, controlled and maintained by said defendant company, O'Neill Road, which is a roadway and thoroughfare extending in a general northerly and southerly direction.

V.

That on or about the 8th day of March, 1952, at about the hour of 2:50 p.m. on said day, Erna Mae Everett was operating a 1938 Dodge panel truck owned by the plaintiff herein, in a general northerly direction along said O'Neill Road; that as Erna Mae Everett attempted to use said public crossing to

cross over said right-of-way and track, said panel truck she was driving stalled squarely on the defendant company's railroad tracks; that at the same time and place defendants were operating a passenger train in a general westerly direction over and along said railroad track and at said time and place defendants ran said passenger train into and against the panel truck Erna Mae Everett was operating as aforesaid, whereby the said Erna Mae Everett was violently crushed and injured and shortly thereafter the said Erna Mae Everett died from the injuries so received.

VI.

That the collision, the death of Erna Mae Everett, and the ensuing damage to plaintiff as set out herein, were directly and proximately caused by negligence on the part of the defendants in one or more of the following particulars:

(a) Defendants drove said train in a negligent, careless and reckless manner and at a speed between 70 and 80 miles per hour, which speed was excessive and dangerous to persons using said crossing at the time, place and under the conditions then existing;

(b) Defendants failed and neglected to provide and maintain any signal, by mechanical device or otherwise, for the purpose of warning Erna Mae Everett and others of the approach of said passenger train;

(c) Defendants failed and neglected to cause a watchman or other person to be stationed at said crossing for the purpose of warning Erna Mae

Everett and others of the approach of said passenger train;

(d) Defendants neglected and failed to sound the crossing signals required by the statutes of the State of Washington as the locomotive approached the said crossing, by either blowing a whistle or sounding a bell of said locomotive;

(e) Defendants negligently failed to stop said train, slacken its speed or give timely or adequate warning of its approach to said crossing when the persons operating the said train saw, or, by the exercise of ordinary care, would have seen, Erna Mae Everett and plaintiff's panel truck in a position of imminent peril of being struck by the said train;

(f) Defendants negligently maintained said crossing area and right-of-way by failing to cut the natural growth, underbrush and vegetation on its right-of-way near said crossing, with the result that said natural growth of underbrush and vegetation obstructed the view of defendant railway company's tracks from persons driving upon O'Neill Road and approaching said crossing from the southerly direction;

(g) Defendants negligently failed to maintain at a proper and safe level the rock and cinder ballast on the roadway leading up to said crossing and immediately next to the wooden planking at said crossing.

VII.

That the collision and Erna Mae Everett's death were further caused by and due to wanton miscon-

duct on the part of the defendants in the operation of the aforesaid passenger train and in the maintenance of the aforesaid crossing, in one or more of the following particulars:

(a) The defendant's servants on said train intentionally, and with a reckless indifference to injurious consequences probable to result therefrom, drove said train at a speed between 70 and 80 miles per hour, which speed was greatly excessive and dangerous to persons using said crossing at the time and place under the conditions then existing;

(b) Defendant's servants operating said train, saw, or should have seen, that an unusually dangerous situation existed when plaintiff's vehicle, operated by Erna Mae Everett, stalled on said railroad track and said Erna Mae Everett was attempting to abandon and flee said vehicle. Yet, knowing that a failure to warn Erna Mae Everett would probably result in serious injury, the defendants proceeded to run said train into said intersection and against plaintiff's said vehicle without previously giving any signal or warning by blowing the whistle or ringing the bell of the locomotive, or giving warning by way of any other device of any kind whatsoever;

(c) Defendants saw, or should have seen, that a collision with Erna Mae Everett was imminent and had the opportunity to realize and appreciate her danger, but the defendants, with reckless indifference to injurious consequences probable to result therefrom, failed to reduce the speed of said passenger train by applying full and sufficient braking

power to the wheels of said locomotive and the cars following it;

(d) Defendants wantonly maintained the said crossing in a dangerous condition in that at said time and place the rock and cinder ballast leading up to said railroad crossing and next to the wooden planking at said crossing had been worn or carried away causing the wooden planking to protrude like a barrier above the roadway in an unusual and hazardous manner, and as a result of the foregoing dangerous conditions, plaintiff's vehicle became stalled on said crossing in the path of defendant's train.

VIII.

That plaintiff's automobile was completely demolished by said collision and was then and there of the reasonable value of \$500.00.

IX.

That plaintiff has incurred expense or indebtedness for the funeral and burial of the said Erna Mae Everett the sum of \$832.76.

X.

That the aforesaid acts and conduct of the defendants, and each of them, were the proximate cause of the death of plaintiff's daughter, Erna Mae Everett, and the resultant damage herein complained of.

XI.

That by reason of the premises, plaintiff has suffered special damages for the demolition of his auto-

mobile in the sum of \$500.00; and has further suffered special damages in the sum of \$832.76 for the funeral and burial of said daughter, and has suffered general damages for the death of his daughter in the sum of \$30,000.00.

Wherefore, plaintiff prays that he recover judgment against the defendants, and each of them, for the sum of \$30,000.00 general damages, and for the further sum of \$1332.76 special damages, or for a total sum of \$31,332.76, and for plaintiff's costs and disbursements herein incurred.

/s/ R. MAX ETTER

/s/ ELLSWORTH I. CONNELLY,

Attorneys for Plaintiff

[Endorsed]: Filed July 28, 1954.

[Title of District Court and Cause.]

ANSWER

Come now the defendants above named and for their answer to plaintiff's complaint admit, deny and allege as follows:

I.

Admit paragraph I of said complaint.

II.

Admit paragraph II of said complaint except that defendant, Northern Pacific Railway Company, alleges that it is a Wisconsin corporation and not a Minnesota corporation as alleged in said paragraph.

III.

Admit paragraph III of said complaint.

IV.

Admit paragraph IV of said complaint.

V.

Admit paragraph V of said complaint.

VI.

Answering paragraph VI of said complaint, defendants deny each and every matter and thing therein contained.

VII.

Answering paragraph VII of said complaint, defendants deny each and every matter and thing therein contained.

VIII.

Answering paragraph VIII of said complaint, defendants have no knowledge or information sufficient to form a belief as to the matters and things therein contained and therefore deny the same. Defendants further specifically deny that as the result of any negligent act on the part of said defendants, or either of them, the plaintiff was damaged in the sum of \$500.00 or any sum whatsoever.

IX.

Answering paragraph IX of said complaint, defendants have no knowledge or information sufficient to form a belief as to the matters and things therein contained and therefore deny the same. De-

defendants further specifically deny that as the result of any negligent act on the part of said defendants, or either of them, the plaintiff was damaged in the sum of \$731.10 or any sum whatsoever.

X.

Answering paragraph X of said complaint, defendants deny each and every matter and thing therein contained.

XI.

Answering paragraph XI of said complaint, defendants specifically deny that as the result of any negligent act on the part of said defendants, or either of them, the plaintiff has suffered special damages in the sum of \$500.00 or any sum whatsoever, special damages in the sum of \$731.10 or any sum whatsoever, or general damages in the sum of \$30,000.00 or any sum whatsoever.

Further answering said complaint and by way of an affirmative defense thereto defendants allege as follows:

I.

That the death of the said Erna Mae Everett was caused and brought about solely and alone through her own negligence, which negligence was a direct and proximate cause of the collision which resulted in her death.

II.

That the death of the said Erna Mae Everett and any and all damages, general or special, alleged to have been sustained by plaintiff as the result of said

collision were caused and brought about by the negligence of the said plaintiff, which negligence was a direct and proximate cause thereof.

Wherefore, defendants, having fully answered herein, pray that this action be dismissed and that they have and recover their costs necessarily expended herein.

/s/ F. J. McKEVITT,
Attorney for Defendants

Acknowledgment of Service attached.

[Endorsed]: Filed August 24, 1954.

[Title of District Court and Cause.]

REPLY

Comes now the plaintiff and for Reply to the Answer of the defendants herein, states as follows:

I.

Plaintiff denies each and every allegation contained in Paragraphs I and II of Defendants' Answer and Affirmative Defenses, and plaintiff denies each and every allegation of whatsoever kind alleged in said Answer which controverts plaintiff's Complaint, or is in any manner inconsistent therewith.

Wherefore, plaintiff having fully replied to defendants' Answer prays that judgment be entered

in accord with his Complaint and that the Answer of defendants be dismissed and held for naught.

/s/ R. MAX ETTER,
/s/ ELLSWORTH I. CONNELLY,
Attorneys for Plaintiff

Jury trial of the above issues is hereby demanded.

/s/ R. MAX ETTER,
Of Counsel for Plaintiff

Acknowledgment of Service attached.

[Endorsed]: Filed August 26, 1954.

[Title of District Court and Cause.]

Defendants' Requested Instruction No. 8

I instruct you that under the laws of the State of Washington in force at the time of this accident it was unlawful for a person to cause or knowingly permit his child under the age of eighteen years to operate a motor vehicle upon a public highway as a vehicle operator unless such child has first obtained a vehicle operator's license. Said law further provides that no person shall authorize or knowingly permit a motor vehicle owned by him or under his control to be operated by any person who is not legally licensed as an operator.

If you find from the evidence in this case that Erna Mae Everett at the time in question did not have a vehicle operator's license and that the plain-

tiff herein knew that she did not have such license, and if you find that said plaintiff authorized or knowingly permitted his daughter to operate the vehicle in question, then I instruct you that the plaintiff violated the law above referred to and was guilty of negligence. If you further find that such negligence was the direct and proximate cause of his daughter's death then your verdict should be for the defendant.

Rev. Code of Wash., 46.20.230—R.R.S. 6312-62.

[Endorsed]: Filed January 19, 1955.

[Title of District Court and Cause.]

Defendants' Instruction No. 10

Plaintiff has invoked in this case what is known in the Law as the last clear chance doctrine. I instruct you that you are not here concerned with a last possible chance on the part of the Railway Company to have avoided this collision. A clear chance to avoid a collision involves the element of sufficient time on the part of the engineer operating defendant's train to have appreciated the peril of the driver of the truck and to take the necessary steps to have avoided injuring the driver thereof. In other words, last clear chance implies thought, appreciation and mental direction on the part of the engineer and the lapse of sufficient time to effectively act upon the impulse to have avoided the collision. The doctrine of last clear chance does not mean a splitting of seconds when injuries arise. The words

mean exactly as they indicate, last clear chance, not possible chance.

I therefore instruct that if you find from the evidence of this case that after the engineer was first able to discover the peril of the driver of the truck he was unable to bring his train to a complete stop or to have slackened its speed for a sufficient interval of time in order to permit the driver to escape, then your verdict should be for the defendant.

[Endorsed]: Filed January 20, 1955.

[Title of District Court and Cause.]

VERDICT

We, the jury in the above entitled cause, find for the Plaintiff in the sum of \$8,632.76.

/s/ WILLIAM W. FYFE,
Foreman

[Endorsed]: Filed January 20, 1955.

[Title of District Court and Cause.]

JUDGMENT ON JURY VERDICT

This action came on for trial before the Court and a jury, Honorable Sam M. Driver, presiding, with all parties appearing by counsel and the issues having been duly tried, and the jury, on the 20th day of January, 1955, having rendered a verdict for

the [plaintiff to recover of the defendant damages in the amount of \$8,632.76].

It is ordered and adjudged that the [plaintiff recover of the defendant the sum of \$8,632.76 and his costs of action.]

Dated at Spokane, Washington, this 21st day of January, 1955.

/s/ STANLEY D. TAYLOR,
Clerk

[Endorsed]: Filed January 21, 1955.

[Title of District Court and Cause.]

MOTION TO SET ASIDE VERDICT AND
JUDGMENT ENTERED THEREON OR IN
THE ALTERNATIVE FOR A NEW TRIAL

Comes now the defendant above named and moves the Court for an order setting aside the verdict of the jury returned in said cause on the 20th day of January, 1955, and the judgment entered thereon on the 21st day of January, 1955.

This motion is made in accordance with the motion for directed verdict made by defendant at the close of plaintiff's evidence, which motion was renewed by defendant at the close of all the evidence.

In the event the foregoing motion is denied, and not otherwise, then the defendant moves the Court for a new trial upon the following grounds, to-wit:

I.

The verdict and judgment are contrary to law.

II.

The verdict and judgment are contrary to the evidence and against the weight of the evidence.

III.

There was no substantial evidence that the defendant was guilty of negligence, which negligence was the proximate cause of the death of plaintiff's daughter.

IV.

The evidence conclusively shows that a proximate cause of decedent's death was her own negligence.

V.

The evidence conclusively shows that a proximate cause of decedent's death was the negligence of plaintiff.

VI.

The Court erred in denying defendant's motion to direct a verdict in its favor at the close of plaintiff's case.

VII.

The Court erred in denying defendant's motion to direct a verdict in its favor at the close of all the evidence.

VIII.

The Court erred in withdrawing from jury consideration the negligence of the plaintiff which had been pleaded as one of its affirmative defenses.

IX.

There is no sufficient or substantial evidence tending to support the amount of the jury's verdict.

X.

The verdict is excessive and appears to have been given under the influence of passion and prejudice.

XI.

The Court erred in failing to give Defendant's Requested Instruction No. 8 or an instruction substantially similar thereto:

"Defendant's Requested Instruction No. 8:

I instruct you that under the laws of the State of Washington in force at the time of this accident it was unlawful for a person to cause or knowingly permit his child under the age of eighteen years to operate a motor vehicle upon a public highway as a vehicle operator unless such child has first obtained a vehicle operator's license. Said law further provides that no person shall authorize or knowingly permit a motor vehicle owned by him or under his control to be operated by any person who is not legally licensed as an operator. If you find from the evidence in this case that Erna Mae Everett at the time in question did not have a vehicle operator's license and that the plaintiff herein knew that she did not have such license, and if you find that said plaintiff authorized or knowingly permitted his daughter to operate the vehicle in question, then I instruct you that the plaintiff violated the law above referred to and was guilty of negligence. If

you further find that such negligence was the direct and proximate cause of his daughter's death then your verdict should be for the defendant."

XII.

The Court erred in failing to give that portion of Defendant's Requested Instruction No. 3, or an instruction substantially similar thereto, which portion of said instruction reads as follows:

"The operators of the train had a right to assume, until the contrary appeared, that the occupant of such automobile, exercising reasonable care for her own safety, would give the train the right of way to which it was entitled under the law, and the operators of said train were not required to take any action intended to slow the speed of the train until they were aware that the said vehicle did not intend to give the train the superior right of way."

XIII.

The Court erred in failing to give Defendant's Requested Instruction No. 7, or an instruction substantially similar thereto, which instruction reads as follows:

"Defendant's Requested Instruction No. 7.

"I instruct you that if the deceased in the operation of her automobile knew of the approach of the defendant's train, and could have stopped short of the tracks and thus avoided the accident, but rather attempted to beat the train across the track, that such action was negligence on her part. If you find from the evidence that the deceased died as the

result of attempting to beat the defendant's train across said track then your verdict should be for the defendant."

XIV.

The Court erred in instructing the jury as follows:

"You are instructed that it is the law of the State of Washington that every engineer driving a locomotive on any railway who fails to ring the bell or sound the whistle upon such locomotive or cause the same to be rung or sounded at least 80 rods from any place where such railway crosses a traveled road or street on the same level, except in cities, or to continue ringing of such bell or sounding of such whistle until such locomotive has crossed such road or street, shall be guilty of a misdemeanor. Therefore, if you find from the evidence in this case that the engineer of defendant's railroad train, F. W. Scobee, failed to ring the bell or sound the whistle upon defendant's locomotive at least 80 rods east of the O'Neill crossing, and failed to continue the ringing of such bell or the sounding of such whistle until the locomotive had crossed O'Neill Road, such failure would be negligence on the part of the defendant herein, and if such negligence proximately caused the death of Erna Mae Everett, it would entitle the plaintiff to a verdict in his favor, in the absence of contributory negligence on the part of Erna Mae Everett. You will be instructed on the various aspects of contributory negligence later on, and I have given you some instructions heretofore in these instructions."

The evidence of plaintiff himself discloses that

ample warning of the approach of the train by whistle signal was given to the deceased girl when the train was at least 685 feet from the crossing and traveling at a rate of speed of 50 to 60 miles per hour.

XV.

The Court erred in instructing the jury as follows:

“Now there is involved in this case what is known as the doctrine of last clear chance. It is permissible to use the doctrine only after you find, and you may not use it unless and until you first find, that in the events leading up to the accident in question, both the deceased and the defendant were negligent.

The doctrine of last clear chance is divided into two phases to cover two separate possibilities: (1) that where the defendant actually saw the peril of the traveler on the highway and should have appreciated the danger and failed to exercise reasonable care to avoid injury, such failure made the defendant liable, although the traveler's negligence may have continued up to the instant of the injury; and (2) that where the defendant did not actually see the peril of the traveler, but by keeping a reasonably careful lookout commensurate with the dangerous character of the agency and the locality should have seen the peril and appreciated it in time by the exercise of reasonable care to have avoided the injury, and failure to escape the injury results from failure to keep that lookout and exercise that care, the defendant was liable only when the traveler's negligence had terminated or eliminated or culminated in a situation of peril from

which the traveler could not by the exercise of reasonable care extricate himself.

Therefore, if either of the two conditions just mentioned are found by you to have existed with respect to the collision in question, then you must find against the defense of contributory negligence, because under such conditions the law holds the defendant liable for any injuries suffered by the plaintiff, that is, on account of the death of Erna Mae Everett in this case, and proximately resulting from the accident, despite the negligence of the deceased."

The basis for claim of error in this regard is:

(1) No evidence of a substantial or probative character was introduced by plaintiff which would justify the submission to the jury of the doctrine of last clear chance.

(2) Plaintiff introduced no evidence of an expert character to the effect that after the peril of the deceased was discovered the train could have been brought to a stop short of the crossing or its speed slackened to such an extent as to have enabled the deceased to have saved herself.

(3) Under the decisions of the Supreme Court of the State of Washington the question of whether or not the last clear chance doctrine can be invoked is one of law to be determined by the Court as such. Since in this state there are two branches to that doctrine it was the duty of the Court to determine which branch applied to the instant case and not to have left that question to the jury.

XVI.

The Court erred in instructing the jury as follows:

“Gentlemen of the jury, I overlooked one claim of negligence here of the plaintiff, and on that point I instruct you that if you find from the preponderance of the evidence that the defendant railway company negligently failed to maintain at a proper and safe level the rock and cinder ballast on the roadway leading up to the crossing and immediately next to the wooden planking at the crossing, and you find that that negligence was the proximate cause of the death of Erna Mae Everett, and you further find it appears that there was no contributory negligent on the part of Erna Mae Everett, then your verdict should be on that point for the plaintiff.”

The basis for this claim of error is as follows:

(1) Since the Court withdrew from the jury's consideration all of the allegations of paragraph VII of the complaint, the planking condition of the crossing was not an issue.

(2) Assuming that it was an issue, there is no evidence that this planking condition was a proximate cause of this truck stalling on the crossing.

(3) There was no evidence from which the jury could infer that the approach to the crossing or the planking condition thereof was a proximate cause of the collision.

XVII.

The Court erred in denying defendant's motion to withdraw from jury consideration subdivision

(g) of paragraph VI of the complaint reading as follows:

“Defendants negligently failed to maintain at a proper and safe level the rock and cinder ballast on the roadway leading up to said crossing and immediately next to the wooden planking at said crossing.”

This motion should have been granted for the reason that there was no evidence or reasonable inference therefrom that the alleged condition of the immediate approach to the crossing was a proximate cause of the truck stalling on said crossing.

XVIII.

The Court erred in denying defendant's motion to withdraw from jury consideration subdivision (d) of paragraph 6 reading as follows:

“Defendant neglected and failed to sound the crossing signals required by the statutes of the State of Washington as the locomotive approached the said crossing, by either blowing a whistle or sounding a bell of said locomotive.”

The evidence of plaintiff disclosed that whistle signals were given at a point at least 685 feet from the crossing. If, as plaintiff contends, the truck was stalled on the crossing when the Diesel engine was 685 feet distant therefrom, said signals were ample warnings of the train's approach.

If, as plaintiff's testimony disclosed, the train was traveling at 50 miles per hour, it would cover 73.33 feet in one second of time. This would have given the deceased approximately $91\frac{1}{3}$ seconds to

have left the truck and gotten into a position of safety.

If, as plaintiff's evidence disclosed, the train was traveling at 60 miles per hour, it would cover 88 feet in one second of time. This would have given the deceased approximately $7\frac{2}{3}$ seconds within which to have left the truck and gotten into a position of safety.

XIX.

The Court erred in refusing to permit defendant to prove under cross-examination of the plaintiff that on and prior to March 8th, 1952, the deceased, Erna Mae Everett, did not have an operator's license to operate a motor vehicle upon a public highway in the state of Washington.

XX.

The Court erred in sustaining the objection of plaintiff's counsel to defendant's offer to prove that on and prior to March 8th, 1952, the deceased Erna Mae Everett, did not have an operator's license to operate a motor vehicle upon a public highway in the state of Washington.

McKEVITT, SNYDER & THOMAS

/s/ By F. J. McKEVITT,

Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed January 28, 1955.

Northern Pacific Railway Company vs.

In the United States District Court for the Eastern
District of Washington, Northern Division

No. 1197

ERNEST EVERETT,
vs.
Plaintiff,

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation, Defendant.

ORDER DENYING DEFENDANT'S MOTION
TO SET ASIDE VERDICT AND JUDG-
MENT ENTERED THEREON OR IN THE
ALTERNATIVE FOR A NEW TRIAL

On March 3rd, 1955, pursuant to notice, the defendant's Motion to Set Aside Verdict and Judgment Entered Thereon, or in the Alternative for a New Trial, came on for hearing before the Court, the defendant being represented by McKevitt, Snyder and Thomas, their attorneys, and the plaintiff being represented by R. Max Etter, his attorney, the defendant, by its attorneys, and by Francis J. McKevitt, submitted oral argument in support of its Motions and said Motions were duly argued to the Court by counsel for defendant and for plaintiff;

Now, therefore, the Court having heard the argument of counsel for both defendant and plaintiff, and having considered the authorities and argument submitted by said counsel, and having reviewed and examined the records, notes and files of the proceeding, and having considered all of the above, and all of the matters appertaining to said cause;

Now, therefore, on the Motion of Defendant to Set Aside Verdict and Judgment entered thereon, or in the alternative for a New Trial,

It is ordered that said Motions, and each of them, be, and the same are, denied. Exception allowed.

Done this 17th day of March, 1955.

/s/ SAM M. DRIVER,

Judge

Presented and submitted by

/s/ R. MAX ETTER

Approved as to form:

McKEVITT, SNYDER and THOMAS,

/s/ By F. J. McKEVITT

[Endorsed]: Filed March 17, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the Northern Pacific Railway Company, a corporation, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in the above entitled action on January 21, 1955, and filed of record in the above entitled court on said date and from each and every part thereof.

Notice is also given that the Northern Pacific Railway Company, a corporation, appeals to said court from that certain order entered in the above

entitled court on March 17, 1955, denying the motion of defendant Northern Pacific Railway Company, a corporation, to set aside the verdict returned in said action and the judgment entered thereon, or, in the alternative, for a new trial, and from each and every part of said order.

Dated this 11th day of April, 1955.

McKEVITT, SNYDER & THOMAS

/s/ By F. J. McKEVITT,
Attorneys for Defendant.

[Endorsed]: Filed April 12, 1955.

[Title of District Court and Cause.]

BOND ON APPEAL

Know all men by these presents that the Northern Pacific Railway Company, a corporation, as principal, and Saint Paul Mercury Indemnity Company, Saint Paul, Minnesota, a corporation, organized under the laws of the State of Delaware and authorized to transact the business of Surety in the State of Washington, as Surety, are held and firmly bound unto Ernest Everett, plaintiff in the above entitled action in the full and just sum of Five Hundred Dollars (\$500.00), to be paid to the said Ernest Everett, his executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 11th day of April, 1955.

Whereas, lately at the District Court of the United States, for the Eastern District of Washington, Northern Division, in a suit depending in said Court between Ernest Everett, plaintiff, and the Northern Pacific Railway Company, a corporation, a judgment was rendered against the said defendant Northern Pacific Railway Company, a corporation, in the sum of Eight Thousand Six Hundred Thirty-two and 76/100 Dollars (\$8632.76) and his costs of action, and the said defendant Northern Pacific Railway Company, a corporation, having filed in said Court a Notice of Appeal to reverse the judgment in the aforesaid suit on appeal to the United States Court of Appeals for the Ninth Circuit at a session of said Court to be holden at San Francisco, in the State of California.

Now, the condition of the above obligation is such that if the said Northern Pacific Railway Company, a corporation, shall prosecute said appeal and secure to the plaintiff the payment of costs if the appeal is dismissed or the judgment affirmed, or of such costs as the Appellate Court may award if the judgment is modified, then the above obligation to be void; else to remain in full force and effect.

NORTHERN PACIFIC RAILWAY
COMPANY, a corporation,

McKEVITT, SNYDER & THOMAS

/s/ By F. J. McKEVITT,
Its Attorneys

SAINT PAUL MERCURY
INDEMNITY COMPANY,
St. Paul, Minnesota,

/s/ By J. L. COX,
Attorney in Fact

[Endorsed]: Filed April 12, 1955.

[Title of District Court and Cause.]

ORDER

It appearing to the court that a Notice of Appeal was filed in the above entitled cause by the defendant (Appellant) on April 11, 1955, and upon oral motion of counsel for the defendant (appellant) it is hereby

Ordered that the time to file and docket the record on appeal in the above entitled cause in the United States Court of Appeals for the Ninth Circuit be and the same is hereby extended to and including the 27th day of June, 1955.

Dated this 5th day of May, 1955.

/s/ SAM M. DRIVER,
United States District Judge

[Endorsed]: Filed May 5, 1955.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

Appellant hereby designates that the record on appeal of this cause to the United States Court of Appeals for the Ninth Circuit shall contain the record of the proceedings in the above entitled court as hereinafter particularly designated:

1. Complaint.
2. Answer.
3. Defendant's requested instruction No. 8.
4. Defendant's requested instruction No. 10.
5. Verdict for the plaintiff.
6. Judgment on verdict.
7. Court's instructions to jury.
8. Motion to set aside verdict and judgment entered thereon or, in the alternative, for a new trial.
9. Order denying motion to set aside verdict and judgment entered thereon, or, in the alternative, for a new trial.
10. Notice of appeal.
11. Cost bond on appeal.
12. Official court reporter's transcript of record (3 volumes) except (a) Opening statement of plaintiff's counsel (Volume 1, page 5). (b) Excerpts of argument of plaintiff's counsel (Volume 3, page 606).
13. Originals of all exhibits introduced in evidence in the trial of this cause.
14. This designation.

Dated this 29th day of April, 1955.

McKEVITT, SNYDER & THOMAS

/s/ By F. J. McKEVITT,
Attorneys for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed May 3, 1955.

[Title of District Court and Cause.]

SUPPLEMENTAL DESIGNATION
OF RECORD

As a supplemental designation of contents of record on appeal appellant designates the following:

Order of Court entered on the 5th day of May, 1955, extending the time of filing and docketing the record on appeal in the above entitled cause to the United States Court of Appeals for the Ninth Circuit to the 27th day of June, 1955.

Dated this 16th day of May, 1955.

McKEVITT, SNYDER & THOMAS

/s/ By F. J. McKEVITT,
Attorneys for Appellant

[Endorsed]: Filed May 16, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Eastern District of Washington—ss.

I, Stanley D. Taylor, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify that the documents annexed hereto are the originals on file in the above entitled cause:

Title of Document.

Complaint.

Answer.

Reply.

Court Reporter's Transcript of Record (Three Volumes—separately bound.)

Exhibits: Defendant's 1, Chart, scene of accident (Enclosed herewith but not attached hereto.)

Plaintiff's 2, Photograph; Plaintiff's 3, Photograph; Plaintiff's 4, Photograph; Plaintiff's 5, Photograph; Plaintiff's 6, Photograph; Plaintiff's 7, Photograph; Plaintiff's 8, Photograph; Plaintiff's 9, Photograph; Plaintiff's 10, Photograph.

Plaintiff's 11, Photograph; Plaintiff's 12, Photograph; Plaintiff's 13, Photograph; Plaintiff's 14, Receipt for funeral expenses; Plaintiff's 15, Receipt for grave marker; Plaintiff's 16, Check for cemetery plot.

Defendant's 17, Photo of crossing; Defendant's 18, Photo of crossing; Defendant's 19, Photograph; Defendant's 20, Photograph; Defendant's 21, Pho-

tograph; Defendant's 22, Photograph; Defendant's 23, Photograph; Defendant's 24, Photograph; Defendant's 25, Photograph.

Defendant's 26, Photograph; Defendant's 27, Photograph; Defendant's 28, Photograph; Defendant's 29, Photograph; Defendant's 30, Photograph; Defendant's 31, Photograph; Defendant's 32, Statement of Lee Klocke.

Plaintiff's 33, Newspaper picture.

Defendant's 34, Blue print of diesel locomotive; Defendant's 35, Blue print of cars; Defendant's 36, Speed Tape.

Defendant's Requested Instruction No. 8.

Defendant's Requested Instruction No. 10.

Court's Instruction to Jury (In Court Reporter's Record.)

Verdict for Plaintiff.

Judgment on Jury Verdict.

Motion to set aside verdict and judgment entered thereon or in the alternative for a new trial.

Order denying defendant's motion to set aside verdict and judgment entered thereon or in the alternative for a new trial.

Notice of Appeal.

Cost Bond on Appeal.

Order extending time to docket appeal.

Designation of Contents of Record on Appeal.

Supplemental Designation of Contents of Record on Appeal, and that the same constitute the record for hearing of the appeal from the judgment of the United States District Court for the Eastern District of Washington, in the United States Court of

Appeals for the Ninth Circuit, as set forth in the Appellant's Designation of Record and Supplemental Designation of Record.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court at Spokane in said District, this 22nd day of June, A.D. 1955.

[Seal] STANLEY D. TAYLOR,
Clerk, U. S. District Court, Eastern District of
Washington.

In the District Court of the United States, Eastern
District of Washington, Northern Division

Civil No. 1197

ERNEST EVERETT, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation, Defendant.

RECORD OF PROCEEDINGS AT THE TRIAL

Be It Remembered that the above-entitled cause came on for trial at Spokane, Washington, on Monday, the 17th day of January, 1955, before the Honorable Sam M. Driver, Judge of the said Court, and a jury; the plaintiff being represented by R. Max Etter, and Ellsworth I. Connelly, his attorneys; the defendant being represented by Francis J. McKevitt and Joseph L. Thomas, appearing for McKevitt, Snyder & Thomas, its attorneys;

Whereupon, the following proceedings were had, to-wit: [16*]

The Court: Everett against Northern Pacific Railway Company.

Mr. Etter: Plaintiff is ready, your Honor.

Mr. McKevitt: Defendant is ready, your Honor.

(Whereupon, a jury was duly impaneled and sworn to try the instant cause, after which the following proceedings were had:)

The Court: I will ask counsel to step up to the bench for just a moment, please.

(Whereupon, the following proceedings were had in the presence, but out of the hearing of the jury:)

The Court: Rather than impanel an alternate here, I wonder if counsel are willing to stipulate if one of the jurors becomes incapacitated from serving for any reason which the Court deems sufficient, I may excuse him and the remaining 11 decide the case?

Mr. Etter: That is so stipulated by the plaintiff.

Mr. McKevitt: Yes, sir.

The Court: Do you want a unanimous verdict, or both of you or either of you?

Mr. McKevitt: I do, your Honor. [17]

Mr. Etter: Doesn't make any difference.

The Court: Well, it will have to be unanimous unless stipulated otherwise.

* Page numbers appearing at foot of page of original Reporter's Transcript of Record.

Mr. McKevitt: I am agreeable if two got off, agree on a minimum of 10.

The Court: It is not likely, but it is possible that two might become ill.

Mr. Etter: All right, agree on a minimum of 10.

The Court: All right. Is there anything else at this stage?

Mr. McKevitt: None.

Mr. Etter: The only thing that we might do, after our statement of our proof, as we have done before, Mr. McKevitt has a diagram——

Mr. McKevitt: I have some pictures.

Mr. Etter: We can put our pictures in.

The Court: You want to use your map in your opening statement?

Mr. Etter: I would like to. We can open the case and have your man on to explain it.

Mr. McKevitt: Yes, he is here, the engineer.

Mr. Etter: As far as the map is concerned.

Mr. McKevitt: We have witnesses who can furnish you with that.

The Court: All right. [18]

(Whereupon, the following proceedings were had in the presence and hearing of the jury:)

The Court: Now, the remainder of the jury panel, those who have not been selected on this jury, will be excused until next Monday morning at 10 o'clock.

I might say that some of the cases that have been set here have been settled, as very often happens, so I will not need any other jurors for a week. But

I will repeat that, in order that there may be no misunderstanding, you won't receive any notice, you will just have to rely on your memory, so be sure to remember to report back here, all of the rest of you who have not been selected on this jury, report back here for duty at 10 o'clock next Monday morning, January the 24th, isn't it?

The Clerk: Yes, your Honor.

The Court: If I said 17th, I misspoke here, this is the 17th. You are to report back Monday morning, January the 24th, at 10 o'clock.

I think I will take a 10 minute recess at this point.

(Whereupon, a short recess was taken.)

The Court: All right, you may proceed. [19]

The evidence likewise will show, ladies and gentlemen, will show that within ten days after this accident occurred—I want to mention these things—there was a crew came out and ballasted the approach to this particular roadway; that it was re-ballasted approximately ten days afterward. Likewise, some ten days after, the brush had been cut down in appreciable amounts along the right of way of the track, particularly on the approach from the Everett side of the track.

And that, I think, is the extent of the proof which the plaintiff intends to show here to you.

Mr. McKevitt: Reserve my statement, if your Honor please.

The Court: All right. It is too late to start calling witnesses now, so the Court will recess until 1:30.

Now, gentlemen of the jury, it is essential that you keep an open mind in this case, as I have told you on prior occasions, until you have heard both sides and have had the benefit of the argument and the Court's instructions, and it is important that you refrain from discussing the evidence or this case at all among yourselves during any of these recesses or overnight adjournments. This is a civil case and we will permit you to separate during recesses and adjournments, but please don't discuss the case, either among yourselves or, of course, not with any outsider. [20]

I might say, too, if there is a newspaper account of the case as it goes along—I suppose there will be some newspaper publicity and perhaps announcements over the radio—just skip that part of the news when you come to it. We prefer that you get your evidence first hand here from the witnesses.

Court will recess now until 1:30.

(Whereupon, the trial in the instant cause was recessed until 1:30 o'clock p.m., this date.)

(The trial in the instant cause was resumed pursuant to the noon recess, all parties being present as before, and the following proceedings were had out of the presence of the jury:)

Mr. Etter: Your Honor, at this time and prior to the time that the jury comes in, it not appearing in the pleadings on either side or any motions made on either side as to the residence of the defendant Scobee, the plaintiff being without knowledge at the time service was made as to [21] the residency of the defendant Scobee, hereby moves to dismiss from

the action the defendant F. W. Scobee, who is now named as a defendant in this cause, and further moves to amend the pleadings by showing the plaintiff as being a resident and citizen of the State of Washington.

The Court: Very well. Do you have any objection to the amendment?

Mr. McKevitt: I won't object, your Honor, on the ground it isn't timely made.

The Court: Very well, the motion will be granted and the pleadings stand amended as indicated by the motion.

I think I should, of course, tell the jury when they come in that the defendant Scobee has been dismissed, because they are entitled to know that.

Mr. Etter: Yes, your Honor.

Mr. McKevitt: Yes, I am glad your Honor made that suggestion.

(Whereupon, the following proceedings were had in the presence of the jury:)

The Court: Gentlemen of the jury, in your absence, on motion of the plaintiff, without objection, and by order of the Court, plaintiff F. W. Scobee has been dismissed as a defendant in this case. So that the case will proceed now as the case of Ernest Everett against the Northern [22] Pacific Railway Company, a corporation, defendant.

You may proceed, then, Mr. Etter.

Mr. Etter: Your Honor, at this time, the defendant has prepared a scale chart of the area involved in this accident, and with the Court's permission, I would like to have it marked.

Do you wish to have it marked as your exhibit?

Mr. McKevitt: Very well.

Mr. Etter: I would like to have it marked as Defendant's Exhibit No. 1.

The Court: Very well.

Mr. Etter: And we would like leave of Court to change the order of proof in this respect, that Mr. McKevitt will be allowed to put on the man who prepared this for the purpose of explaining it to the jury to expedite the matter.

The Court: Yes, all right.

The Clerk: This exhibit will be marked as admitted, your Honor?

The Court: Yes. I assume you have no objection?

Mr. Etter: I have no objection, your Honor, stipulate for its admission.

The Court: Defendant's Exhibit No. 1 will be admitted, and then if Mr. McKevitt cares to do so, he may put on a witness to explain it. [23]

(Whereupon, the said chart was admitted in evidence as Defendant's Exhibit No. 1.)

Mr. McKevitt: We were agreeing to furnishing the map characterizing the location, but with reference to calling of the engineer to explain the map, why, I think that is part of Mr. Etter's case to show what the map shows.

Mr. Etter: If he is here, I will do it.

Mr. McKevitt: Yes, Mr. Adams is here.

Mr. Etter: All right.

Your Honor, I might inquire of the jurors

whether they can see this map at this location? If not, we will probably have to change it.

The Court: Can you all see the map there? It may be difficult for you to see some of the fine lines in there, but then in order to get it closer to all of them, you would have to put it in middle here. Can you see the markings on the map?

A Juror: Yes.

The Court: Well, if the end men here can, then it ought to be all right.

Mr. Etter: Your Honor, I might say that up at the end of this map is what is designated as the whistle post. It should be in here and I am just trying to determine where. [24]

Well, Mr. Carlile says he will hold it and the jury can probably get it.

Mr. Adams, will you take the stand, please.

Mr. McKevitt: Keep your voice up.

WALTER R. ADAMS,

called and sworn as a witness on behalf of the plaintiff, testified as follows:

The Clerk: Did you want Mr. Adams to sit down, Mr. Etter?

Mr. Etter: Beg pardon? I think probably we could expedite it if you just stand over here (indicating).

Direct Examination

Q. (By Mr. Etter): You state your name, please. A. My name is Walter R. Adams.

Q. Where do you live, Mr. Adams?

A. I live in Seattle.

(Testimony of Walter R. Adams.)

Q. And by whom are you employed?

A. I am employed by the Northern Pacific Railway.

Q. And what is your position with the Northern Pacific?

A. I am Division Engineer on the Tacoma Division.

Q. The Tacoma Division. And for what length of time have you been Division Engineer, Mr. Adams? [25]

A. About two or three years.

Q. And is part of your duty as a Division Engineer for the Northern Pacific in Seattle to, upon request, draw scale maps of particular parts of the railroad trackage or areas of the Northern Pacific property?

A. Yes, sir.

Q. And the Tacoma Division, it does include, does it, certain trackage running east and west into and out of Ellensburg, Washington?

A. Yes, sir.

Q. And does it include a particular trackage starting at the city limits of Ellensburg and running in a westerly direction of several miles?

A. It does.

Q. Pursuant to request made to you, Mr. Adams, did you prepare a chart of the area where the accident happened that is the basis and the issue in this lawsuit?

A. This chart was made under my direction.

Q. It was made under your direction?

A. Yes, sir.

(Testimony of Walter R. Adams.)

Q. In the engineer's office? A. Yes.

Q. And to your knowledge, is the chart an accurate representation of the particular area as a chart or diagram?

A. It was made up from survey notes which I made myself, [26] personally, and supervised the preparation of the map.

Q. And supervised the preparation of the map. Now, with respect to the map, Mr. Adams, will you tell us and explain to the jury the directions as they appear on the map?

A. Compass north is indicated by this arrow marked "N." The terminology from the railroad parlance is east and west along this line (indicating), which is the main line of the Northern Pacific, with Ellensburg being at this direction and Seattle in that direction.

Q. Mr. Adams, would you mind taking this pencil and at the board end of the diagram, that is, Defendant's Exhibit 1, here and at the other end, will you put fairly large "E" and "W" to show east and west, and then the jury and the Court and the rest of us can follow it? Put it right up on the board there, or, rather, that is it, right about in there. A. (Witness complies.)

Q. And will you put a north and south likewise on there at a convenient place?

A. (Witness complies.)

Q. Make them a little larger, if you will, Mr. Adams. A. I have done so.

Q. Thank you, sir. Now, in the preparation of

(Testimony of Walter R. Adams.)

the Defendant's Exhibit 1, Mr. Adams, did you employ a particular scale to indicate length in feet?

A. Yes, sir, which is noted on the map, the scale one inch is equal to 20 feet.

Q. That is as to all of the distances, roadways and other matters appearing upon the map?

A. Yes, sir.

Q. One inch to 20 feet? A. Yes, sir.

Q. Now, Mr. Adams, you have observed, have you not, that general area when you were making your field notes? A. Yes, sir.

Q. Would you explain the diagram that you have drawn there, indicating what is the railroad, the overpass, et cetera, as it appears to the jury?

A. These two lines to which I am now pointing with the pointer represent the main line of the Northern Pacific Railway. The parallel lines to the north represent the highway, the east and west highway.

Q. Would you take the pencil now and just before the two lines that represent the railroad, would you put "N.P." and above the other put "P.H." for public highway? Make those rather large so we can see them, and initial each one of them, please, if you will, Mr. Adams.

Mr. McKevitt: Would you mind, Max, making that "N.P. Main Line?" [28]

Mr. Etter: "N.P. Main Line," Mr. McKevitt suggests, Mr. Adams.

A. "P.H." for public highway?

Q. You might put "Public H.," then we won't

(Testimony of Walter R. Adams.)

lose track of it. That is Public Highway, is it not, sir? A. "Public Hwy."

Q. Thank you, sir. All right, if you will continue.

A. And "N.P. Main Line" (indicating).

Q. All right, will you explain the rest of the diagram?

A. The particular crossing involved is represented by these two lines to which I am now pointing, and south of the track, the highway, the road divides, part of it running west, part of it south, and part of it running southeasterly to the Milwaukee undercrossing, the Milwaukee Railway.

The Milwaukee overpass is represented by these lines to which I am now pointing, and at each end of this blocked-in area there is a concrete pier, with a concrete pier on either side in between the ends, so there are four concrete piers supporting the Milwaukee.

Q. That is correct.

A. Would you like to have me say this road from the crossing goes out and goes in underneath the Milwaukee?

Q. Could you tell us whether you remember from your [29] observation notes that after the road to which you have reference crosses under the Milwaukee underpass, could you tell us whether or not it goes then in an easterly and westerly direction paralleling the track or close thereto?

A. No, it doesn't quite, it goes in a southerly

(Testimony of Walter R. Adams.)

direction about as my end of my pointer (indicating).

Q. Probably southeasterly, would that be fairly correct?

A. Well, it is southeasterly from what this is shown, yes. It is actually compass direction south.

Q. I see.

Mr. McKevitt: Should he mark the Milwaukee while he is at it, Max?

Mr. Etter: Yes.

Q. Now, if you would, would you mark this on the Milwaukee, and I think probably where you indicated the crossing, if you will just put "Crossing" there so we can get all those points established?

A. I have written "Milw." for Milwaukee.

Q. Thank you.

A. And how would it do to just put "Xing" over here?

Q. That is fine. Put it up closer, if you can, oh, say, right in about here (indicating). Would that be about right, "Xing"?

A. All right. I have done so. [30]

Q. Thank you. Now, are there any other points that you drew on the map that aren't indicated by the name that would give us some idea on distances there, like posts or otherwise?

A. Yes, at the extreme east end of the map is a little mark which indicates the location of a whistle post.

(Testimony of Walter R. Adams.)

Q. Can you put "W.P." on that? Mr. Carlile, you can hold it there. A. "W.P."

Q. Initial that, too.

A. (Witness complies.)

Q. Probably better initial these others, Mr. Adams, that you missed here, "Xing" and "Milw."

A. "W.R.A." is put on, my initials.

Q. If you can without the necessity of measuring, can you tell the members of the jury and the Court how far the whistle post, as you have indicated there, is in feet from the crossing?

A. 1,323 feet.

Q. 1,323 feet?

A. From the center of the crossing.

Q. From the center of the crossing to the whistle post, 1,320 feet? A. 1,323.

Q. 1,323. Now, can you, without measurement, give us an [31] idea of how far it is from the whistle post to the middle of the overpass, to a point on the Northern Pacific track about the middle of the overpass?

A. The middle of the overpass is 686 feet from the center of the crossing.

Q. I see.

Mr. McKevitt: He asked you about the whistle post distance.

A. You have to deduct 686 from 1,323.

Q. (By Mr. Etter): 637, am I right?

Mr. McKevitt: Not very good at arithmetic, Max.

Q. (By Mr. Etter): But it is 686 feet, never-

(Testimony of Walter R. Adams.)

theless, is that it, from the middle of the crossing?

A. That is from the middle of the crossing to the middle of the overhead crossing.

Q. Of the overhead, 686 feet? A. Yes, sir.

Q. Consequently, the balance of the distance, whatever it might be, as you have indicated, is the difference between that and the 1,323?

A. Yes, sir.

Q. Now, can you tell us, Mr. Adams, the height of the overpass, the clearance, I guess you call it, the clearance height from the N.P. tracks?

A. I can by referring to my notes. [32]

Q. That is all right, if you wish to do so.

A. It is in the neighborhood of 22 feet, I know that.

Q. It is in the neighborhood of 22 feet?

A. 22 feet.

Mr. McKevitt: What is that Max, the height?

Mr. Etter: The height of the overpass from the track of the road bed of the N.P.

A. That is from the top of the rail. 22½ feet is the overhead clearance from the top of the rail to the bottom of the girder over the Northern Pacific track.

Q. Fine. All right, thank you, Mr. Adams.

I might ask, Mr. Adams, it is not shown on the map, but if you are familiar with it, following the Northern Pacific main line in an easterly direction toward Ellensburg, shall we say, down where the block signals are that are some considerable distance east?

(Testimony of Walter R. Adams.)

A. I do not know, I didn't check up on that.

Q. You didn't check? A. No.

Q. You aren't able to tell me what that distance is?

A. I have it indicated on a profile which I have with me, but I wouldn't say that that is correct and I want to say everything I say is correct.

Q. Certainly, certainly. Can you tell me offhand or approximately the distance from the crossing in an [33] easterly direction toward Ellensburg, can you tell me the distance that the rail line of the Northern Pacific Railroad is almost straight without any curves? Do you know that distance?

A. No, but I can look it up. It is several miles.

Q. Could you do that without too much difficulty? A. From the crossing?

Q. Yes, from the grade crossing.

A. The first curve is right near the—not very far from the Ellensburg depot. It would be several miles or nearly four miles.

Q. It would be several miles? A. Yes.

Q. In which the railroad is in a straight easterly and westerly direction up to this crossing?

A. Yes, sir.

Q. Is that correct. Can you tell me, Mr. Adams, with respect to the amount of grade that is involved in the track extending from, oh, about the curve just approximately, I don't think it need be absolutely exact, down to about the grade crossing?

A. It is an uphill grade, generally speaking, from Ellensburg west.

(Testimony of Walter R. Adams.)

Q. From Ellensburg west?

A. Generally speaking, is an uphill grade. [34]

Q. Generally speaking, there is an uphill grade. Do you know what the degree is? Offhand, do you know what the degree of grade is?

A. Well, it varies considerably. It varies, every little ways it changes.

Q. I see. A. In per cent of grade.

Q. I see. But you would say it is a slight grade toward the west?

A. Yes. It varies. Well, I have five-tenths of 1 per cent up to one-tenth of a per cent, .36 per cent. It varies considerably, but it is all, I would say, less than five-tenths.

Q. It is all less than five-tenths of 1 per cent?

A. Which means half a foot per hundred feet.

Q. Half a foot per hundred feet? A. Yes.

Q. In other words, there is less than a half a foot of grade per hundred feet in that whole stretch of track; is that correct?

A. I don't see any place where it is over five-tenths of 1 per cent.

Q. Over five-tenths of 1 per cent?

A. Just—— do you want me to describe it a little more particularly? [35]

Q. Yes, I would.

A. Just east of the crossing?

Q. Yes, if you would, please.

A. Just at the crossing, it is .49 per cent ascending westward.

Q. At the crossing?

(Testimony of Walter R. Adams.)

A. Right at the crossing.

Q. All right.

A. Prior to the crossing, there is what we call a vertical curve which is 1,400 feet long, and just beyond that there is a slight descending grade going west.

Q. I see.

A. Six-hundredths of 1 per cent, which is about six-eighths of an inch in 100 feet.

Q. That would be the descending grade that you are taking about?

A. Yes, that would be that descending grade that is the other side of this 1,400 foot vertical curve.

Q. I see. The 1,400 foot vertical curve, you do not mean a curve in the track, but on the matter of grade?

A. I can explain that very readily.

Q. All right, sir.

A. By a reference to a highway grade. As you are approaching a change in the grade of the highway, changing from going up to going down, you can't see beyond that. [36]

Q. I see.

A. But there is a change, not abrupt, there is no abrupt change, but a slight change, each hundred feet as it goes over a summit or through a valley.

Q. You speak of a slight change there?

A. Yes.

Q. All right.

A. For that 1,400 feet, it would probably be about a twenty-five hundredths or about three

(Testimony of Walter R. Adams.)

inches, average about a twenty-five hundredths grade for that 1,400 foot, although it wouldn't be at that grade at any particular point.

Q. I see.

A. It is cubic perabla, if I can get technical.

Q. In other words, what it is in laymen's language, during that 1,400 feet, that is the gradual grade that you have given us in one-hundredths?

A. It is a gradual change.

Q. Change, rather.

A. Change in grades, from almost a zero grade to a five-tenths grade. The average would be about three inches per hundred feet. That would be the average for the whole distance.

Q. All right, now, Mr. Adams, in the corner, or rather up [37] toward the north along the highway, you have a square drawn in there. Will you tell us what that indicates?

A. That is the location of the house.

Q. Known as the O'Neill house?

A. That is the way I understand it.

Q. Yes. Would you write in there "O'Neill House"?

A. "O'Neill House" and initials.

Q. Thank you.

A. "Ho," representing house.

Q. Could you tell me, Mr. Adams, or do you remember when you were making your field notes, and I am not going to ask you to put it in, but do you remember whether there were also some buildings over on this side or the west side of the

(Testimony of Walter R. Adams.)

highway which is shown running past the O'Neill house?

A. There were some buildings over there, but just where they were, I don't know.

Q. You don't know, but you did see buildings over there? A. Yes.

Q. All right.

Mr. Etter: I think that is all, Mr. Adams.

Mr. McKevitt: A few questions, your Honor.

The Court: Yes, all right. [38]

Cross-Examination

Q. (By Mr. McKevitt): Mr. Adams, when you speak of a grade of 3/100ths, generally, is that a generally ascending grade?

A. It is a general ascending grade from Ellensburg to this location.

Q. But it varies?

A. It varies at different locations.

Q. Are you able to tell us, say, from a point at the underpass, the center of the underpass to the center of the crossing, whether the grade is a gradual descending or ascending, or what?

A. It is gradually ascending from the Milwaukee underpass to the crossing.

Q. But never reaches a height above what?

A. Above five-tenths.

Q. Yes. A. That is half a foot.

Q. 1 per cent grade means a rise of one foot in each 100 feet?

(Testimony of Walter R. Adams.)

A. Yes, sir. That is where that vertical curve I was telling you about is in.

Q. Yes. You have given us the distance of the whistling post to the center of the crossing is 1,323 feet, is that correct? A. Yes, that is correct.

Q. And then you have given us the distance from the center of the road bed in the middle of the underpass to the center of the crossing, is that correct? A. 686 feet, yes, sir.

Q. Now, how much trackage, Milwaukee trackage, do you show on that map? Would you scale that off for us, from this point here which I am pointing to to this point? Got your ruler with you?

A. Yes. 40 inches times 20 is 800 feet.

Q. 800 feet. Now, with reference to the highway on which thing young lady was driving, we want all the jurors to see that.

Mr. McKevitt: Are we agreed, Mr. Etter, that this area that I am marking—not marking, but tracing with my pencil—is the highway that she traveled on her approach to the crossing?

Mr. Etter: That is correct, the last part of it, Mr. McKevitt.

Mr. McKevitt: Shown on the map.

Mr. Etter: That is correct.

Mr. McKevitt: And that the Everett home is some one-half a mile towards the east end of the map?

A. That is correct, approximately one-half a mile east, approximately, from the grade crossing.

Q. By the way, Mr. Adams, I was down there

(Testimony of Walter R. Adams.)

with you when we went over this thing several weeks ago? A. Yes, sir.

Q. Do you recall whether or not this highway that comes out of Mr. Everett's home some distance up toward the east end of the map, whether it generally parallels the Northern Pacific track until it makes a kind of a right-hand turn?

A. Well, you might be able to say that generally, but it separates, if you are going down the highway toward the Everett home, it gradually gets a little further away from the track than it is at this particular point here (indicating).

Mr. Etter: That is correct, it does.

Mr. McKevitt: Well, then, Mr. Etter, could we have a designation on here, then, with arrows, "Route of Miss Everett" or "Route of the Truck"?

Mr. Etter, Yes, yes.

Q. (By Mr. McKevitt): Will you mark those on there, just pointing toward that and put the direction, "Direction of truck"? Just put "Truck" right after and the arrow will indicate she is traveling toward the track.

A. (Witness complies.)

Q. Now, will you scale off the distance on that roadway that she was traveling on that is shown on the map? [41]

A. I think I can tell you how far that was from the center of the Milwaukee crossing, if that would be all right.

Q. Yes.

A. I have that in my notes. Well, maybe I

(Testimony of Walter R. Adams.)

better scale it, because my notes, I would have to add them up and I am not very good at mental arithmetic.

Q. All right. A. 295 feet.

Q. 295 feet?

A. To the center of the Milwaukee Railroad.

Q. What you are talking about now, the 295 feet, is it——? A. Yes.

Q. ——represents the distance from the county highway or county road on which she was traveling as it passed under the Milwaukee, is that correct?

A. That is correct.

Q. To the crossing. Now, have you got some data or information on the grade of this county road from this point where the road passes under the Milwaukee to the crossing? A. I have.

Q. All right, tell us what that is.

A. At 12 feet from the crossing (indicating on map), the road is six-tenths, or 7 inches. Engineers use the designation tenths and I am liable to confuse the jury [42] unless I explain what that means.

In order to add up feet and inches, we are liable to get mixed up, so we use what we call tenths of a foot. Instead of six inches, it is five-tenths, and you can just add them right up and not have to divide by 12 when you get through for your inches. So if you will excuse me if I say tenths once in awhile instead of inches.

Q. All right.

A. 12 feet from the crossing, it is seven inches

(Testimony of Walter R. Adams.)

below the center of the crossing. 18 feet further——

Q. In feet toward——

A. This way (indicating).

Q. When you say “this way”——?

A. Toward the home of the Everetts.

Q. That’s right.

A. It is five inches lower yet.

Q. What is the grade there?

A. Well, the grade in that 18 feet would be a 7 per cent grade.

Q. 7 per cent grade.

A. Then at 100 feet, which is 70 feet further, there is a drop of two feet and one inch, which would make it, that 70 feet from the 30 feet to 100 feet, which would make the grade a 3 per cent grade in that 70 feet, and [43] the next 18 feet is a 7 per cent grade.

Q. Well, now, would it be too much trouble, could you quickly estimate the average grade of this county road from where it passes under the Milwaukee Railway Company to the center of the crossing? Just the average grade?

A. Well, the 300 feet and a five foot raise from the center of the Milwaukee crossing to the center——under the Milwaukee to the crossing at the Northern Pacific track is——

Q. The average grade is what?

A. Five feet divided by 300 is approximately 1.7 per cent grade.

Q. That is the average grade?

A. That is the average grade.

(Testimony of Walter R. Adams.)

Q. Now, you have designated on this map what is known as the O'Neill house. From this (indicating), that would be generally the southerly line of the house, wouldn't it? A. Yes.

Q. From the center of the southerly line of the house, how far is that to the center of the crossing?

A. The center of the railway crossing?

Q. That is correct? A. 553 feet. [44]

Q. 553 feet?

A. From the center of the railway crossing measured along the road to the south line of the O'Neill house.

Q. Well, what is the distance from the center of this highway to the center of the crossing in a straight line?

A. Well, from the edge of the highway to the center of the crossing——

Q. All right, that is good enough.

A. It is 154 feet.

Q. 154 feet.

Mr. McKevitt: I think that is all.

Mr. Etter: Just a few questions.

The Court: Yes.

Redirect Examination

Q. (By Mr. Etter): Mr. Adams, just one or two questions more, if I may. If I understood your testimony in answer to some of Mr. McKevitt's inquiries, the distance between the spot where the road that the truck was on where it passes under

(Testimony of Walter R. Adams.)

the Milwaukee overpass to the middle of the grade crossing, you say, was 300 feet?

A. 295, 300 feet.

Q. Do your field notes show, starting in with the Milwaukee grade crossing, starting underneath it, do they show [45] the percentage of grade for the first 100 feet? A. Yes.

Q. What is that percentage?

A. Two-tenths per cent grade for the first hundred feet.

Q. Two-tenths per cent? A. Yes, sir.

Q. In inches, how much would that be?

A. Two-tenths——

Q. Would be two inches?

A. A little over two inches.

Q. A little over two inches of grade in the first hundred feet? A. Yes, sir.

Q. All right, then, in the second hundred feet?

A. Practically level.

Q. Practically level?

A. Yes. There is two-tenths difference in that next hundred feet, too.

Q. I see. Then, the first 200 feet, if I am correct, the first 200 feet from the Milwaukee overpass in the direction of the Northern Pacific main line, the first 200 feet is practically level?

A. To all intents and purposes, yes.

Q. To all intents and purposes. Then in the last 90 feet, there is approximately a five foot difference, is there not? [46]

(Testimony of Walter R. Adams.)

A. Correct, yes.

Q. How much grade is there, if you can tell us, in the next 50 feet beyond the first 200?

A. I can't tell you that.

Q. Can you tell us the next 100?

A. I can tell you the next 70.

Q. All right, the next 70?

A. That is a three per cent grade.

Q. Three per cent? A. Yes.

Q. And how many inches would that be?

A. Well, it is two feet and one inch, approximately.

Q. Two feet and one inch? A. In 70 feet.

Q. Oh, the first 200 feet is practically level and then in the next 70 feet there is a two foot raise?

A. Yes, sir.

Q. A two foot raise. Then beyond that, the next 25 feet, there is a three foot raise?

A. No, the next 30 feet there is a two foot raise.

Q. Another two foot raise?

A. Yes. That is to the center of the crossing.

Q. To the center of the crossing? A. Yes.

Q. I see.

A. But the next 18 feet, there is a little less than that.

Q. There is a little less. How much is there there? A. One foot, four inches.

Q. All right, now, if I have it correctly, to recap, we have 200 feet that is almost level?

A. Yes.

(Testimony of Walter R. Adams.)

Q. With the exception of a few inches. The next 70 feet is an approximate two foot raise?

A. Yes.

Q. The next 70. Then beyond that, the next 30, is that correct?

A. The next, there is another two foot raise.

Q. There is another two foot raise?

A. Now, that 70 feet, excuse me, that 70 feet is—yes, that's right.

Q. There is a two foot raise? A. Yes.

Q. All right, and then in the next—was it 20 feet, did you say? A. 12 feet.

Q. The next 12 feet?

A. Is six inches up.

Q. Six inches up. And the last 18 foot? [48]

A. Well, the last 12 feet was six inches. From the crossing to 12 feet out, it would be the six inch raise.

Q. Then, the footage began, as you have indicated, 70 feet and the next 100 feet? A. Yes.

Mr. Etter: All right, I think that is all, Mr. Adams.

Mr. McKevitt: That is all. If I wish to excuse Mr. Adams, is that okay?

Mr. Etter: Yes.

Mr. McKevitt: One moment, please.

Mr. Thomas makes a suggestion which I think is in order.

Recross Examination

Q. (By Mr. McKevitt): The width of the underpass or overpass?

(Testimony of Walter R. Adams.)

A. From the Milwaukee Railroad?

Q. Yes?

A. I can give you the clearance.

Q. Well, you gave us the clearance at the top.

A. I can give you the sideways clearance, too.

Q. That is it.

A. That would be between these two middle concrete columns (indicating). [49]

Q. That's right.

A. To the north. From the center of the track to the edge of the column on the north is 10 foot, six inches, and from the center of the right track to the edge of this column (indicating) on the south is 24 feet, six inches. The total distance between the two columns at right angles to the track, therefore, would be 35 feet.

Q. That is what I have in mind.

Mr. Etter: Thank you.

Mr. McKevitt: That is all.

(Witness excused.)

Mr. Etter: Call Mr. Everett, please.

ERNEST EVERETT,

plaintiff herein, called and sworn as a witness on his own behalf, testified as follows:

Direct Examination

Q. (By Mr. Etter): Mr. Everett, when you are testifying, as his Honor indicated, the acoustics are rather difficult in this courtroom, so you

(Testimony of Ernest Everett.)

will have to speak up, keep your voice up. The Court has to hear you and so do counsel and all of these jurors, right to the last juror, so you keep your voice up, will you, sir? [50] A. Yes, sir.

Q. All right, will you state your name, please?

A. Ernest Everett.

Q. And where do you live, Mr. Everett?

A. Well, about half a mile below the railroad crossing to my gate.

Q. What state do you live in?

A. Oh, Washington.

Q. Washington. And you have stated below the railroad track, near what town?

A. Near Ellensburg.

Q. That is in Kittitas County?

A. Yes, sir.

Q. I see. And how long have you lived at your present home, Mr. Everett?

A. Since '50, the fall of '50.

Q. Since the fall of '50. That would be what month, do you recall? A. November.

Q. In November. And you have resided, Mr.—you are married, sir? A. Yes, sir.

Q. And how long have you been married?

A. Well, we celebrated our 29th wedding anniversary last Saturday. [51]

Q. This past Saturday? A. Yes, sir.

Q. 29 years. And you have had how many children? A. Four.

Q. Four children. And will you tell us, girls, boys? A. Three girls and one boy.

(Testimony of Ernest Everett.)

Q. Three girls and one boy. And how old is the oldest girl? A. She is 26.

Q. Is she married? A. Yes, sir.

Q. And the next girl? A. 24.

Q. Is 24. Is she married? A. Yes, sir.

Q. And the third girl was the deceased daughter, Erna Mae? A. Yes, sir.

Q. And you have another youngster at home?

A. Yes, sir.

Q. What is he? A. A boy.

Q. What age is he? A. 13.

Q. Beg your pardon? A. 13. [52]

Q. 13. And what is your occupation?

A. Well, I do a little farming and most of my work in a sawmill.

Q. I see. And your property, what does it consist of, your farm property, Mr. Everett?

A. Well, pasture mostly now.

Q. Got to speak up?

A. Pasture ground now. I farmed it for awhile.

Q. How much pasture ground do you have?

A. Well, 75 acres, 76 acres altogether.

Q. You say you did farm it for awhile?

A. Yes, sir.

Q. What type of farming?

A. Raised grain.

Q. Grain. And do you have any stock? Do you run any stock of any kind there?

A. Small bunch of sheep there.

Q. You have sheep. About how many?

A. A hundred.

(Testimony of Ernest Everett.)

Q. About a hundred head of sheep?

A. Uh-huh.

Q. And any other stock? A. No, sir.

Q. Can you tell us, Mr. Everett, or can you indicate to the [53] jury, if you are unable to from there, will you step down, if you can't find it on the map, at least give the jury an idea where you live in relation to the particular area that we see there?

A. Well, you mean the road, the railroad?

Q. Yes?

A. That is kind of behind, isn't it?

Q. Are you able to see the lines on this?

A. Yes.

A. On this map, and the railroad running here in an easterly-westerly direction?

A. Yes, sir.

Q. And the overpass, are you able to see that going through here? A. Yes, sir.

Q. And the road that eventually extends past your house approaching the railroad and the crossing over here? A. Yes, sir.

Q. All right. Now, will you tell us, directionally speaking, about where you live in or near that general area?

A. Well, it would be in kind of the southeastern part.

Q. Will you come down as close as you can and tell us about the relation that your house bears to the track there? This is, as Mr. Adams says, the whistle is here (indicating). [54]

(Testimony of Ernest Everett.)

A. It would be somewhere way down in here some place.

Q. Down in there. You want to watch your scale, you see. Your road comes down like this.

A. Well, it would be—this is the road here (indicating)?

Q. No, that is the railroad.

A. Would your county road be right in here?

Q. Your county road comes down in here like this.

A. Oh, yes.

Q. But down in there?

A. Over in here somewhere between this road and the track.

Q. That road and the track. In other words, you live back from the county road, don't you?

A. Oh, yes.

Q. About how far?

A. Oh, I would say it is about not quite a quarter of a mile from the house.

Q. From the county road. That is this road up here that extends down, is that correct?

A. Yes.

Mr. McKevitt: How far did he say?

Mr. Etter: Back from the county road?

Mr. McKevitt: Yes.

Mr. Etter: About a quarter of a mile, Mr. McKevitt. You can take the stand again. [55]

Q. In March of 1952, did you own a truck?

A. Yes, sir.

Q. What kind of a truck was that?

(Testimony of Ernest Everett.)

A. Well, it was a '40 Dodge panel, what they call a panel truck.

Q. A panel truck. And how long had you had that truck?

A. Well, I just got it that fall when I moved out.

Q. When you had moved?

A. Out here from Montana.

Q. Where had you been prior to the time that you moved to Washington?

A. I lived at Kalispell, Montana.

Q. Kalispell, Montana. How long had you lived in Kalispell before you moved over here?

A. Practically all my life.

Q. Practically all of your life. And what type of work over there?

A. Well, I worked for the county for quite awhile, then I did some farming for myself.

Q. You did some farming for yourself, all right. And you had a Dodge panel on the 8th day of March, 1952, is that correct? A. Yes, sir.

Q. Your daughter Erna Mae, the deceased girl, was she [56] staying with you, was she with you at that time? A. Yes, sir.

Q. And what was her age on the date that she was killed?

A. Well, she was 16. She would have been 17 the next month.

Q. I see.

Mr. McKevitt: Next when?

Mr. Etter: The following month.

(Testimony of Ernest Everett.)

Q. Was she in school there where you reside?

A. Yes, high school.

Q. She was in high school. And what grade was she in high school? A. Junior—or—junior.

Q. Beg pardon? A. Junior.

Q. Junior.

The Clerk: I have marked this photograph as Plaintiff's 2 for identification.

Q. (By Mr. Etter): Without indicating otherwise, will you just tell me what Plaintiff's Exhibit 2, is Mr. Everett? A. That is my daughter.

Q. And when was that picture taken?

A. Maybe she would know, I don't remember. Was it taken here? [57]

Q. No, with respect to March of 1952, was it taken a few months earlier than that?

A. Oh, yes.

Q. Do you recall what month?

A. No, I couldn't say exactly the month it was taken.

Q. Was it, though in the late fall of 1951?

A. It could have been.

Q. Yes. Her class picture, wasn't it?

A. Yes.

Mr. McKevitt: Taken when?

Mr. Etter: In November.

Mr. McKevitt: No objection.

The Court: It will be admitted, then. That is No. 2?

Mr. Etter: No. 2, your Honor.

(Whereupon, the said photograph was ad-

(Testimony of Ernest Everett.)

mitted in evidence as Plaintiff's Exhibit No. 2.)

Q. Mr. Everett, are you rather familiar with the railroad property in the general area indicated by the Exhibit No. 1? A. Yes, sir. [58]

Mr. Etter: Your Honor, may I just confer with counsel a minute about some writing?

The Court: Yes.

The Clerk: Your Honor, I have marked Plaintiff's Exhibits 3 through 12 for identification.

The Court: All right.

Mr. McKevitt: 3 to 12, both inclusive?

The Clerk: Inclusive.

Q. (By Mr. Etter): Handing you the Plaintiff's Exhibit 3 for identification, without going into any description at all, will you just tell us what that is, Mr. Everett?

Mr. McKevitt: May I examine the photographs along with counsel?

The Court: Yes, you may do that.

A. It is taken from the whistle stop west.

Q. (By Mr. Etter): From the whistle stop west.

Mr. McKevitt: No objection to that.

The Court: It will be admitted, then. That is 3, isn't it?

Mr. Etter: 3, your Honor.

(Whereupon, the said photograph was admitted in evidence as Plaintiff's Exhibit No. 3.) [59]

Q. And No. 4, Mr. Everett?

(Testimony of Ernest Everett.)

A. That is taken from the whistle stop east.

Q. From the whistle stop east.

Mr. McKevitt: Whistle stop looking east?

Mr. Etter: Looking east, yes.

Mr. McKevitt: No objection, your Honor.

The Court: It will be admitted. That is 4.

(Whereupon, the said photograph was admitted in evidence as Plaintiff's Exhibit No. 4.)

Q. (By Mr. Etter): No. 5?

A. That is taken looking west—looking west.

Q. Looking west?

A. From the underpass.

Q. Do you know where it is taken, how far back that is? Do you know that spot?

A. Well, it is kind of a culvert creek down.

Q. A culvert creek, all right.

Mr. McKevitt: Off the record, is this looking east towards Ellensburg?

Mr. Etter: No, it is looking west.

Mr. McKevitt: It is taken from a point east of the [60] Milwaukee overpass?

Mr. Etter: That is correct.

Mr. McKevitt: Looking west?

Mr. Etter: Looking west, that is correct.

Mr. McKevitt: How far east to the overpass?

Mr. Etter: In excess of 2,000 feet.

Mr. McKevitt: Approximately 2,000.

Mr. Etter: I think it is possibly a good 700 or 1,000 more than that. We measured the 2,000 and walked up the track.

(Testimony of Ernest Everett.)

Mr. McKevitt: Well, you approximate it and I will take your word for it.

Mr. Etter: I think it is approximately between 2 and 3,000.

Mr. McKevitt: Feet east of the Milwaukee overpass?

Mr. Etter: Correct.

Mr. McKevitt: All right, no objection.

The Court: It will be admitted, then.

(Whereupon, the said photograph was admitted in evidence as Plaintiff's Exhibit No. 5.)

Q. (By Mr. Etter): Plaintiff's Exhibit No. 6, Mr. Everett? [61]

A. This is looking east from the railroad, from the road crossing, toward the underpass.

Q. Looking east towards Ellensburg from the grade crossing? A. Yes.

Mr. McKevitt: No objection.

The Court: It will be admitted.

(Whereupon, the said photograph was admitted in evidence as Plaintiff's Exhibit No. 6.)

Q. (By Mr. Etter): No. 7?

A. This was taken on the west side of the underpass, taken in the underpass.

Q. On the west or the east side?

A. The east.

Q. On the east looking west?

A. Yes, the east looking west.

Q. Looking west down toward the crossing?

(Testimony of Ernest Everett.)

A. Yes.

Q. All right.

Mr. McKevitt: No. 7, then, the camera is facing west?

Mr. Etter: Correct. [62]

Mr. McKevitt: At some point a slight distance east of the underpass?

Mr. Etter: Yes, a point about—as a matter of fact, it is about 30 feet or close thereto.

Mr. McKevitt: No objection.

The Court: It will be admitted.

(Whereupon, the said photograph was admitted in evidence as Plaintiff's Exhibit No. 7.)

Q. (By Mr. Etter): Now, No. 8?

A. That is taken approaching the underpass.

Q. No, approaching the grade crossing.

A. Or the road crossing, yes.

Q. The road crossing itself, and a panoramic shot, so-called, isn't it?

The Clerk: Your Honor, I'm sorry, these photographs run through No. 13, rather than 12.

The Court: All right.

Mr. McKevitt: May I ask some questions on voir dire on this one?

The Court: Yes.

Mr. McKevitt: Mr. Everett, did you take this picture which is Plaintiff's Exhibit 8? [63]

A. No, sir.

Mr. McKevitt: Were you present when it was taken? A. No, sir.

(Testimony of Ernest Everett.)

Mr. McKevitt: Well, who took it, Max?

Mr. Etter: Bell.

Mr. McKevitt: Who?

Mr. Etter: Bill Bell.

Mr. McKevitt: When was this picture taken?

Mr. Etter: June 26, 1952.

Mr. McKevitt: And where is this car standing?

Mr. Etter: The car is on the county road before it makes the curve, I would say, or after it makes the curve, rather, under the viaduct. I would say, if you want my estimate of it, it is about 175 to 200 feet from the grade crossing.

Mr. McKevitt: I have to object to this picture, if your Honor please, taken June 26, 1952. That is March, April, June, is some three and a half months afterwards, and, since vegetation and obstruction entered into this case, I would have to object to that photograph.

Mr. Etter: Well, I can qualify it in that respect, if you wish.

Mr. McKevitt: You can't qualify it to go with the vegetation in three and a half months.

The Court: Well, I think there should be [64] some evidence as to similarity of conditions before it is admitted. That is number what?

The Clerk: That is No. 8.

Mr. Etter: No. 8.

Q. Mr. Everett—

Mr. McKevitt: Your Honor admitted that, may I inquire?

Mr. Etter: No.

(Testimony of Ernest Everett.)

The Court: No, I felt there should be some evidence of similarity of conditions or as to the comparison of conditions.

Mr. McKevitt: Then, the objection is sustained?

The Court: Yes, for the present.

Q. (By Mr. Etter): Mr. Everett, did you examine the general area about the crossing and along the fence line to a distance of or 300 feet from the grade crossing shortly after your daughter was killed? A. Yes, sir.

Q. How soon after?

A. Well, right away after.

Q. Right away after. Did you observe the condition of the brush, growth and vegetation in that area from a point possibly 200 feet from the grade crossing in a generally southerly or easterly direction or along that county road? A. Yes, sir.

Q. And what was that condition?

A. Well, there was tall brush all along there.

Q. Tall brush all along that area?

A. All along there.

Q. Now, on June the 26th, you were not present for these pictures? A. No, sir.

Q. But you were along this particular area, were you not, on June the 26th; is that correct?

A. Yes, sir.

Q. As appears in Exhibit 8, was that the general condition of the area? A. Yes, sir.

Q. Could you tell us what difference there is, if there is any, between the area that is represented there on June the 26th and the area as you saw

(Testimony of Ernest Everett.)

it when you examined it the day after your daughter was killed on March the 9th?

A. There was more brush there then.

Q. More brush where?

A. Along there then. It had been cut off.

Q. There was more brush in March than there was on this date? A. Yes. [66]

Q. Was there any difference, however, in the vegetation itself?

A. Well, of course, the stuff wasn't in bloom at that time.

Q. In bloom when?

A. In June, but in March there was more.

Q. You say it wasn't in bloom in March, isn't that what you meant?

A. Yes. No, it wasn't.

Q. But in June it was? A. Yes.

Q. I see. What is the difference between, if there is any? You said the difference that this was more in March than there was in June?

A. Higher brush, it had been cut off.

Q. I see, than there appears in this picture?

A. Yes, sir.

Q. Did the brush, the high brush that you described, or the brush that was there in March, did that stay on, was anything done about that brush, do you know?

Mr. McKevitt: Is this for the purpose, may I inquire of getting——

Mr. Etter: Well, I will move it be admitted

(Testimony of Ernest Everett.)

now on his testimony thus far. Unless you have *voir dire*.

Mr. McKevitt: I still object to it. [67]

The Court: It will be admitted, then. Let's see, that is No. 9?

The Clerk: 8, your Honor.

The Court: I mean this was 8, yes, the next one.

Mr. McKevitt: I want the record to show, also, if your Honor pleases, improper identification or lack of identification of this photograph.

The Court: All right, the record may so show.

(Whereupon, the said photograph was admitted in evidence as Plaintiff's Exhibit No. 8.)

Q. (By Mr. Etter): Handing you Plaintiff's Exhibit No. 9, can you tell me what that is?

A. That is taken along the county road toward the underpass.

Q. Toward the underpass. And are the same differences present there? The brush is in bloom here and it was not in March, is that correct?

Mr. McKevitt: I object to the form of the question, leading and suggestive.

Q. (By Mr. Etter): All right, tell us the difference. Mr. Everett, just tell me the difference between the brush as it appears here in June and as it appeared in [68] March when you went down there and took a look at it?

Mr. McKevitt: Object to the form of that question. It is assuming there was a difference.

(Testimony of Ernest Everett.)

Q. (By Mr. Etter): All right, is there a difference between the brush as it appears here and as it appeared to you in March?

A. After it was cut down, a lot of it, sure, it would be different.

Q. Well, what is the difference, if you will tell us?

A. Well, have a better view after it is cut off. Still ain't very good.

Q. I see. No, but I want you to confine yourself, if you will, Mr. Everett, to this particular exhibit. Will you tell me now in what respect that differs from the brush as it was in March. Just tell us very plainly, if you will.

A. You got a better view after the brush is cut off.

Q. And in what other respects? Does it differ in any other respect, Mr. Everett, than it did on March 9th? That is what I am asking you.

A. Oh, well, after you cut down the brush, why, it naturally would make a difference in the viewpoint.

Q. I see. A. Of the railroad.

Q. Any other difference in the appearance of the vegetation? [69]

A. Well, it would be bloomed out in June, I suppose.

Q. It what?

A. It would be kind of bloomed out in June, I suppose, where it wouldn't be in March.

(Testimony of Ernest Everett.)

Q. I see. Otherwise, can you name any other differences? A. No.

Mr. Etter: I will move that the exhibit be admitted on that qualification, your Honor.

Mr. McDevitt: I want to examine on voir dire. Did you take this picture?

A. No, sir.

Mr. McKevitt: Were you present when it was taken? A. No, sir.

Mr. McKevitt: Do you know when it was taken except what you have heard here?

A. In June.

Mr. McKevitt: Well, you know that from what Etter tells you? A. Yes.

Mr. McKevitt: Do you know where the camera was stationed at the time this picture was taken?

A. No, sir.

Mr. McKevitt: Object to it as not being properly identified and as being incompetent, irrelevant and immaterial. [70]

Mr. Etter: One more question.

Q. I will ask you whether or not you were down in that area that day?

A. Yes, I go through there every day.

Q. All right, does this actually represent the condition of the brush as you found it or as you saw it on the 26th day of June? A. Yes.

Mr. Etter: Are you going to object because I haven't got the cameraman.

Mr. McKevitt: I am going to object because I don't know how far that camera was from the

(Testimony of Ernest Everett.)

crossing. It might have been 200 feet toward his home or 100 feet toward the crossing.

The Court: I will take a recess and I will excuse the jury for the afternoon recess.

(Whereupon, the following proceedings were had out of the presence of the jury:)

The Court: I didn't realize there was going to be an objection here on lack of identification.

Mr. Etter: I didn't, either.

The Court: As to these photographs, I think if counsel chooses to object, I don't think there has been proper identification here, because he is entitled to know [71] when these were taken and the light condition and the camera angles and the distance, and so on. He should be able to cross-examine on those points, if he wishes, so I had assumed that the only objection here was the failure to show substantially similar conditions between the time of the accident and June. But if the objection is made that they are not properly identified, I don't believe they have been.

Mr. Etter: No, that is correct.

The Court: That is 8 and 9, both.

Mr. Etter: Have to have camera angles and I will have to get the photographer and I will require him to bring his.

Mr. McKevitt: Wait a minute, Mr. Etter, let's be fair. You didn't show me those two pictures this morning.

Mr. Etter: I showed you every one of these.

Mr. McKevitt: I said so far as having a photog-

(Testimony of Ernest Everett.)

rapher here, but I assumed, like when you refer to my pictures, I know where that camera was.

The Court: I don't think I need to be in on this. I will recess.

Mr. McKevitt: I want to know where the camera was, that's all.

The Court: Court will recess for 10 minutes.

(Whereupon, a short recess was taken, [72] after which the following proceedings were had in the presence of the jury:)

Mr. Etter: Your Honor, Mr. McKevitt and I—I have given him the feet at which these pictures were taken and the position from which they were taken——

Mr. McKevitt: You refer to exhibit numbers, Max.

Mr. Etter: So I am referring at this time to Exhibit Nos. 9, 10 and 11.

The Court: Wasn't 8 included in that, too?

Mr. Etter: 8 was admitted, but I guess if there is an objection——

The Court: Yes, I thought the same ruling should be made on that, unless you have reached an agreement on it.

Mr. McKevitt: Until I get the data from Mr. Etter on this, I can't commit myself one way or the other.

The Court: I will just withhold my ruling on that until you do.

Mr. Etter: But on 9, 10 and 11, I have given him the distance in feet from the crossing itself

(Testimony of Ernest Everett.)

and the direction in which the camera was pointed, and Mr. McKevitt says there will be no objection.

Mr. McKevitt: Location of the camera.

Mr. Etter: Location, yes. The question now is the matter—— [73]

Mr. McKevitt: You got the data on the back.

Mr. Etter: On each one of them.

Mr. McKevitt: All right.

Q. (By Mr. Etter): Now, 9, Mr. Everett, can you tell us if that is——

Mr. McKevitt: I think, if the Court please, for the purpose of acquainting his Honor with the position taken, this all goes to the question of identification, but when they are offered in evidence, I am not admitting that they are material.

The Court: Yes. I had assumed that you are not pressing your objection to lack of identification, but you reserve all other objections.

Mr. McKevitt: That is exactly correct, your Honor. Thank you.

Mr. Etter: Correct.

Q. Does that accurately represent the condition that existed on June the 26th? A. Yes.

Q. As to that particular picture, Mr. Everett?

A. Yes, sir.

Q. And in what respects, will you tell us, does that differ from the condition as it existed on March the 8th, 1952?

A. Well, the brush is shorter and a little more foliage. [74]

Q. A little more foliage? A. Yes.

(Testimony of Ernest Everett.)

Q. In other respects, does it accurately represent what existed there on March the 8th, with those exceptions, that it is shorter but it is more filled out? A. Yes, sir.

Q. All right.

Mr. McKevitt: Are you offering that now?

Mr. Etter: No, I am going to put them all in at once.

Q. And, likewise, would that be true with respect to No. 10?

Mr. McKevitt: I object to the form of this question.

Q. (By Mr. Etter): All right, then, does that accurately represent the situation as it existed in June? A. Yes, sir.

Q. The 26th of 1952? A. Yes, sir.

Q. Now, can you tell us the difference that exists as you note it there from that condition on June the 26th, 1952 as compared to on or about a few days after March the 8th of 1952?

A. Well, more brush been slashed down in there.

Q. All right, and anything else different? [75]

A. More foliage on this brush that stands.

Q. I see. In other respects, is there any difference from that condition as it exists as you see it in that picture and as it existed March 8, 1952?

A. No.

Q. All right, with respect to No. 11, taken 70 feet from the crossing facing the overpass, do you recall whether that was an accurate representation

(Testimony of Ernest Everett.)

of the condition as it existed on June the 26th of 1952? A. Yes, sir.

Q. And you had an opportunity to examine this entire area, did you, in March shortly after the 8th day of March of 1952? A. Yes, sir.

Q. Does this accurately represent it as it appeared in June when you looked at it?

A. Yes, sir.

Q. And can you tell us what differences there are that you can note between this picture taken on June 26, 1952 and the appearance of the particular area as you saw it in March of 1952 after the date of the accident?

A. There is more view of the road now than there was then.

Q. There is more view of the road? [76]

A. In the railroad, yes.

Q. In that exhibit than there was then, is that correct? A. Yes.

Q. Any other differences? A. No, sir.

Q. In other words, then, with the exception there was more view there now than there was in March, does it accurately represent the situation and the condition of the area as it existed in February, 1952; is that correct? A. Yes, sir.

Mr. McKevitt: That is as to Exhibit 11?

Mr. Etter: Yes, those are 9, 10 and 11, Mr. McKevitt. I ask that they be admitted.

The Court: Do you wish to examine them?

(Testimony of Ernest Everett.)

Mr. McKevitt: I would like to examine, yes, your Honor.

The Court: Yes.

Voir Dire Examination

Q. (By Mr. McKevitt): Referring, Mr. Everett, to Plaintiff's Exhibit No. 9 for identification, I have agreed that the picture was taken 140 feet from the crossing and toward your home, with the camera in the highway. You understand that?

A. Yes. [77]

Q. Looking in the direction from which the train was coming, the Milwaukee overpass, you understand that? A. Yes, sir.

Q. Now, it is your testimony, is it, that at 140 feet from the crossing here the foliage that is shown there is thicker than it was on March 8th? It is thicker, isn't it?

A. It would be a little thicker.

Q. But you say the foliage as shown there isn't as high as it was in March? A. No, sir.

Q. And how high was it in March?

A. Never measured it, but——

Q. Do you know how high it was?

A. So you couldn't see through there to the underpass.

Q. 140 feet, you couldn't see through there to the underpass? A. Yes.

Q. And that is on March 8th, could you see through there on March 8th to the underpass?

A. No, sir.

(Testimony of Ernest Everett.)

Q. And you couldn't see through there on June 26th to the underpass? A. No.

Q. Well, now, are you telling us that at that distance, [78] 140 feet from that crossing, that some member of the Northern Pacific Railway Company had cut this brush after March 8th.

A. In front here (indicating).

Q. Well, 140 feet back from the crossing?

A. That would be in front where they slashed.

Q. Oh, in front of that distance where they slashed? So, so far as Plaintiff's Exhibit No. 9 is concerned, after March 8th there was no cutting of that brush by any member of the railway company that you know about; is that true?

A. This was halfway back to the Milwaukee, practically.

Q. Yes. In other words——

A. The brush was slashed in front of there. That is where it was (indicating).

Q. Up toward the crossing is where they did the cutting after the accident?

A. Well, yes, you couldn't see through there clear to the crossing.

Q. Well, you know that every spring down there the Northern Pacific Railway Company cuts brush along the right of way?

Mr. Etter: Just a minute. That isn't proper voir dire examination, it is cross-examination.

A. There is a lot of brush there yet, it hasn't been [79] slashed down yet.

Q. (By Mr. McKevitt): Well, to make myself

(Testimony of Ernest Everett.)

clear, you are not telling the Court or jury that in this area shown in Plaintiff's Exhibit 9 for identification, that any of that brush in that area at that distance from the crossing had been cut by the Northern Pacific sometime after March 8th and up to June 26th? You are not telling us that, are you? A. In front it had been slashed.

Q. In front of it, but not in this area shown in the picture?

A. Well, I presume that maybe isn't on the Milwaukee right of way.

Mr. McKevitt: Object to it as incompetent, irrelevant and immaterial.

Mr. Etter: Mr. Everett, it is on the approach, isn't it, along that road within 140 feet?

A. It is along the road.

Mr. McKevitt: Well, now, I object to counsel interrupting my voir dire examination, if the Court please.

The Court: Go ahead.

Mr. Etter: I thought you made an objection. Do you want to make more examination on that?

Mr. McKevitt: I am objecting to that and waiting for the Court to rule. Object to 9 on the grounds it is [80] incompetent, irrelevant and immaterial.

The Court: This, Mr. Everett, is this weeds or brush? A. It is brush.

The Court: It is deciduous brush?

A. Yes.

(Testimony of Ernest Everett.)

The Court: What I mean, it sheds its leaves in the wintertime? A. Yes.

The Court: I see. It will be admitted, then.

The Clerk: That was No. 9, your Honor?

The Court: Yes.

(Whereupon, the said photograph was admitted in evidence as Plaintiff's Exhibit No. 9.)

Mr. McKevitt: Mr. Etter, Plaintiff's Exhibit 10 has a marking, a writing on the back of it, "Panoramic." You will agree that is not a panoramic photograph? There is only one photograph.

Mr. Etter: Yes, that is only one photograph.

Mr. McKevitt: Well, the "Panoramic" should come off of that.

(Whereupon, Mr. Etter obliterated the said marking.) [81]

Q. (By Mr. McKevitt): Showing you Plaintiff's Exhibit for identification 10, it is understood that the camera was in the center of the road facing the crossing and about 70 feet from the crossing. Is that your understanding?

A. On the county road.

Q. And is it your testimony that the condition that is shown in that picture was the same or substantially similar to the condition on March 8th of '52?

A. There has been more brush slashed in there.

Q. This viaduct there is where the Northern Pacific comes under the Milwaukee, isn't it?

A. Yes, sir.

(Testimony of Ernest Everett.)

Q. And what are these lines along here?

A. That is the railroad track.

Q. That is the Northern Pacific main line, isn't it?

A. Yes, sir.

Mr. McKevitt: I have no objection to that one.

The Court: It will be admitted, then.

(Whereupon, the said photograph was admitted in evidence as Plaintiff's Exhibit No. 10.)

Q. (By Mr. McKevitt): And with reference to Plaintiff's [82] Exhibit No. 11, that structure that is shown there, that is the Milwaukee overpass, is it not?

A. Yes.

Q. And these dark lines here running in the direction right and left on the picture is the Northern Pacific main line, isn't it?

A. Yes, sir.

Q. And a person, then, sitting in the car where this is shown, looking toward the Milwaukee viaduct, would have that view of the track, would they not?

A. (No response.)

Q. Isn't that true?

A. Yes, sir.

Mr. McKevitt: No objection to that.

The Court: Yes, No. 11 will be admitted.

(Whereupon, the said photograph was admitted in evidence as Plaintiff's Exhibit No. 11.)

Mr. Etter: This one, as you can see, it is just a car approaching the brush top.

Mr. McKevitt: Where is this now? Is this car facing the way she came up?

Mr. Etter: Yes. [83]

(Testimony of Ernest Everett.)

Mr. McKevitt: The train is over on this side?

Mr. Etter: That's right, there is the Milwaukee overpass right here.

Mr. McKevitt: No, no, here, that is the driver there. Oh, no, this is the driver over here.

Mr. Etter: Yes.

Mr. McKevitt: That's right.

No objection to that.

Mr. Etter: All right.

The Court: That is No. 12. It will be admitted, then.

(Whereupon, the said photograph was admitted in evidence as Plaintiff's Exhibit No. 12.)

Mr. Etter: This is 13, taken 200 feet back on the approach on the side.

Mr. McKevitt: 200 feet?

Mr. Etter: Yes. It is two-thirds of the way back to the overpass.

Mr. McKevitt: You say the front of the car here is about 200 feet from the crossing?

Mr. Etter: The picture taken 200 feet.

Mr. McKevitt: Oh, the picture. Well, this [84] notation is not correct. 200 feet would indicate that the car is 200 feet.

(Discussion between counsel out of the hearing of the reporter.)

Mr. Etter: Let's put it this way, then.

(Mr. Etter made a further notation on the said exhibit.)

Mr. McKevitt: That is all right.

(Testimony of Ernest Everett.)

Mr. Etter: All right, no objection, then, Mr. McKevitt, to 13.

The Court: It will be admitted.

(Whereupon, the said photograph was admitted in evidence as Plaintiff's Exhibit No. 13.)

Mr. Etter: No. 12, you haven't heard the witness explain, gentlemen of the jury, is a picture of an automobile facing north, taken by the camera facing south at the grade crossing, and No. 13 is a picture of a car going north to the crossing and the picture was taken 200 feet from the crossing on the county highway looking toward the crossing and from the rear of the car. [85]

Direct Examination (Continued)

Q. (By Mr. Etter): Now, Mr. Everett, on March the 8th of 1952, were you at home that morning? A. Yes, sir.

Q. And were you there in the early part of the afternoon between 2 and 3 o'clock?

A. Yes, sir.

Q. And can you tell us what the condition of the weather was that day?

A. Oh, well, it was a nice morning.

Q. As to visibility? A. Clear.

Q. It was clear? A. Very clear.

Q. I see. Do you recall whether there was any amount of snow around or on the ground?

A. No, I don't believe there was.

Q. You don't believe that there was. And at

(Testimony of Ernest Everett.)

that time, was your daughter, that is, was Erna Mae at home? A. Yes, sir.

Q. And had she been around the home all of that morning? A. Uh-huh.

Q. You will have to speak out, the reporter can't see you [86] nod your head. She had been at home that morning? A. Yes, sir.

Q. All right. Now, at around 2:30 or 2:40, did she take the automobile, take the Dodge?

A. Yes, sir.

Q. And would you tell us what she did just about that time?

A. Well, she came out of the house and wanted to go get the mail.

Q. And do you remember about what time that was?

A. Well, I suppose around a quarter until 3, somewhere along there, I couldn't say exactly.

Q. All right. All right, go ahead then.

A. And so I was working there tearing down an old bridge across the little creek in front of the house, and so——

Q. Just a minute, so the jury can get it, you say there was a creek in front of the house?

A. Yes, sir, a little creek.

Q. You were tearing down the bridge?

A. Yes.

Q. All right.

A. And so I went out to the barn, probably 200 feet, she got in the car and started it, I went out to the barn and opened the gate for her. [87]

(Testimony of Ernest Everett.)

Q. Opened the gate for her. All right?

A. And——

Q. What did you do after she left? Did you stay there, or did you come back?

A. No, I stood there for a little bit. I had been working the road out to the highway or out to the county road, dragging it with a tractor, you know, it was a little muddy, and I stood there. Then I walked out a little bit in the pasture in front of the barn to watch to see if she might slide, you know, around or get stuck or something, but she went right out through it.

Q. All right?

A. Then I stood there and I thought I heard a train coming, and I looked back and I stood there and watched her again and just as she went out of sight of timber by Mr. Klocke's, I could see the train approaching down there by that billboard.

Q. Where was that?

A. Down by the bill sign on the highway.

Q. All right, now, with respect to this diagram, you say you looked over to the sign. Could you tell us where that sign would be with regard to this particular Exhibit 1? At what corner of the sign, toward what corner?

A. Well, it would be on that east corner there.

Q. On this east corner? A. Yes.

Q. And was the sign here on the railroad or over on the highway?

A. Well, it was just across the highway on a parallel from my place, kind of east.

(Testimony of Ernest Everett.)

Q. I see. And where you saw it come into view, was it right by this particular road sign you are talking about? A. Yes, sir.

Q. All right. And you saw the train, did you, going past that sign?

A. As she went out of sight behind this timber.

Q. As she went out of sight behind the timber?

A. Uh-huh.

Q. Where was she going at that time?

A. She was going after the mail.

Q. I mean, what road was she on?

A. On the county road.

Q. And whose property is that that she had approached? You say Mr. Klocke's?

A. By Mr. Klocke's place.

Q. By Mr. Klocke's place. All right. Then will you tell us if anything happened that you recall?

A. Well, then I looked back again and looked to see where [89] the train was and never thought very much about it because I thought she had plenty of time to get across the crossing.

Q. I see. Then will you tell us what occurred?

A. Well, then I stood there for a little bit, and then I thought, "She has had plenty of time to get across," I heard two or three toots of the whistle, sharp toots. Then I waited awhile, the time she should be starting back and she hadn't showed up, so I started up the road afoot, thinking something could have happened.

When I got up there, why, some people met me with the car and took me on up.

(Testimony of Ernest Everett.)

Q. Took you up where?

A. Where she was killed.

Q. Well, where was it, up at the crossing?

A. Yes, sir.

Q. All right. When you got down to the crossing, when you got down to this railroad crossing that afternoon, will you tell us what you saw there at the crossing, Mr. Everett?

A. Well, I saw her laying about 90 feet up above the crossing——

Q. Just a moment. You say 90 feet, you think?

A. Well, about that.

Q. All right, now, you say “above,” do you mean east or west? [90]

A. It would be on the west of the crossing.

Q. This is west direction (indicating).

A. Yes, on the west side of the crossing.

Q. And did you see the train? A. Yes, sir.

Q. Beg your pardon? A. Yes, sir.

Q. And where was the train?

A. It was on up further, up the track further.

Q. Up the track? A. Yes, sir.

Q. Beyond where the body of Erna Mae was?

A. Yes, sir.

Q. How far up, do you have any idea?

A. Well, quite a ways up there from where she was to the train.

Q. When you say quite a ways, you can't estimate it in feet?

A. No, I couldn't exactly.

(Testimony of Ernest Everett.)

Q. I see. And did you go up and look at the train at all? A. No, sir.

Q. You did not? A. I did not.

Q. Did you see the automobile? [91]

A. I saw it after they had—the wrecker had hauled it to town.

Q. You saw it after the wrecker hauled it to town. You didn't see it at that time when you were there?

A. No, sir, I didn't go up.

Q. Beg your pardon?

A. I didn't go up to look at it.

Q. You didn't go up to look at it. All right. And you saw Erna Mae, as you say, was dead?

A. Yes.

Q. All right. Now, some days following, Mr. Everett, did you make some examination or investigation of this particular area?

A. The following day?

Q. No, a few days after the accident, did you make an examination?

A. Well, we went—I went by there every day working. I worked in town, you see.

Q. No, but I mean after this accident, did you make some investigation?

A. Oh, yes, I took a measurement of the crossing there where the planks were, and there was a jump-up, you come up and jump up on the track about five inches. When you come around to make the turn to come up across the track, why, natur-

(Testimony of Ernest Everett.)

ally, the car went up slow, you [92] would have to go slow to cross it.

Q. I see.

A. To make the turn, and I figured that the front wheels went up and the hind wheels hit the plank and that is what stalled the car.

Q. Well, did you see——

Mr. McKevitt: I object to that, if your Honor pleases, and move it be stricken.

The Court: Yes, I think so.

Mr. McKevitt: And the jury instructed to disregard it.

The Court: The opinion of the witness should be stricken and the jury is instructed to disregard it.

Q. (By Mr. Etter): Mr. Everett, you can't give an opinion, you can just tell the jury what you found.

The Court: Tell the situation, what is a physical fact.

Q. (By Mr. Etter): The situation, what you saw, don't give them any opinion.

Are you talking about the roadway as it approached the railroad tracks at the crossing? Is that what you were describing? A. Yes, sir.

Q. And handing you here Plaintiff's 6 for identification, the crossing itself, now what area were you referring [93] to that you say you measured?

A. Well, it was right along the side of the plank.

(Testimony of Ernest Everett.)

Q. Now, you are pointing to the outside, the plank on the outside of the rail? A. Yes, sir.

Q. Isn't that correct?

A. Where the gravel had been kind of dug away.

Q. The gravel and the ballast, you mean, leading up to that bank? A. Yes, sir.

Q. You say you measured, what did you measure?

A. I measured the depth of the plank. They are four-inch plank, rough plank, and it was dug out below them some.

Q. It was dug out below them. You mean there was an area dug out below that plank?

A. Yes.

Q. Do you know how far that dug-out area extended north, or rather—yes, extended out on the highway in the direction of your place? Do you know how far that dug-out part extended?

A. I imagine it would be a few feet there on account of making that turn in the road. You know how a car will kind of dig it up when they make that turn.

Q. I see. All right, now, did you do anything else with [94] respect to your investigation shortly after this accident? Did you check any distances, let's put it that way?

A. Oh, yes, we checked the distance from that sign board down on the highway to the crossing.

Q. To the crossing. Now, you are referring, are you——

(Testimony of Ernest Everett.)

A. Down on the highway.

Q. —to the sign board which you were telling the jury about which you would place in the area east and beyond the public highway?

A. Yes, sir.

Q. Is that the sign board you are talking about? You say you took the distance to that sign board from the railroad crossing? A. Yes, sir.

Q. The grade crossing where this accident occurred? A. Yes, sir.

Q. How far is that, how far was that sign?

A. That was a mile and three-tenths.

A. A mile and three-tenths. All right, tell me this, since the time that you measured that, have you rechecked that distance? A. Yes, sir.

Q. When did you do that?

A. Last Friday. [95]

Q. Last Friday. And who was present when that was rechecked as to distance?

A. Mr. Etter and Mr. Connelly there and Mr. Klocke.

Q. Mr. Klocke. And you? A. Yes, sir.

Q. Four of us, is that correct? A. Yes.

Q. And what was the distance that was checked or did you see that distance checked?

A. A mile and three-tenths.

Q. And how many times was it checked?

A. Twice.

Q. And how? A. By a car.

Q. I see. All right, and did you make any—

(Testimony of Ernest Everett.)

shortly after this accident occurred, did you check any other distances? A. Yes.

Q. And what other distances did you check?

A. Checked the distance from where she went out of sight by Klocke's until she got to the railroad track.

Q. Where Erna Mae, you mean?

A. Crossing.

Q. On the county road, where she went out of your sight? A. To the crossing. [96]

Q. Behind the trees at Klocke's to this grade crossing? A. Yes, sir.

Q. All right, and what was the distance you found there?

A. Three-tenths of a mile.

Q. Three-tenths of a mile. And you did that shortly after this accident? A. Yes, sir.

Q. And kept those measurements?

A. Yes, sir.

Q. Will you tell me whether that measurement has been rechecked? A. Yes, sir.

Q. That is the measurement from Klocke's place down to the highway? A. Yes, sir.

Q. And when was it rechecked?

A. Last Friday.

Q. And who was there?

A. Mr. Etter and Mr. Conner——

Q. Connelly.

A. Connelly, Mr. Klocke and me.

Q. I see. And what was the measurement that it checked out?

(Testimony of Ernest Everett.)

A. That was three-tenths of a mile.

Q. Three-tenths of a mile. Now, when Erna Mae left that [97] morning, had she driven down there before?

A. Yes, sir.

Q. I see. And could you estimate, could you tell her speed?

A. Well, I figured it was around 25 to 30 miles an hour.

Mr. McKevitt: I think the point should be fixed where he is talking about the speed, if your Honor please.

The Court: Yes.

Q. (By Mr. Etter): When you observed her car traveling in the direction down the county road toward Klocke's and before it disappeared from view, did you have a chance to observe it?

A. Yes, sir.

Q. And did you have a chance to observe the speed? Could you see the speed or approximately at which she was traveling?

A. Well, I figured it was around 25 or 30 miles an hour.

Q. You figured it was about that?

A. Uh-huh.

Q. You watched her drive it before?

A. Yes, sir.

Q. Had you driven with her?

A. Yes, sir.

Q. And she had driven with you. And you had watched her before, had you?

A. Yes, sir.

Q. And it is on that basis you make this estimate?

A. Yes.

(Testimony of Ernest Everett.)

Q. What did Erna Mae do around the home place, Mr. Everett? Did she help out around the home place?

A. Well, she helped me most all the time when she was out of school.

Q. And in what way?

A. Well, she done plowing, 30 acres, of that spring we had the plow.

Mr. McKevitt: Did what?

A. We had to plow.

Mr. Etter: About 30 acres of plowing during the spring.

A. During her school vacation.

Q. Could she operate the tractor?

A. Yes, sir.

Q. And the other mechanized equipment on the farm?

A. Raked hay, mowed the hay.

Q. I mean, did she work right along with you?

A. Yes, sir.

Q. During the summer and spring vacations?

A. Yes, sir.

Q. She did. On the farm, doing farm work. All right. Do you know whether or not she had ever worked out? Did she work out? [99]

A. Well, she had before she came, she used to drive a tractor back there for the neighbor when he was hauling hay into the barn, you know.

Q. Had she ever worked for Mr. Klocke, do you know?

(Testimony of Ernest Everett.)

A. Well, she had been up there an awful lot of the time.

Q. Been up there. Now, had you been over this crossing yourself sometime prior to this accident?

A. Yes, sir.

Q. Had you been over it?

A. The day before. The day before, we were in town on Friday.

Q. The day before you had been in town on Friday. Now, will you describe to the jury, aside from the pictures that are here, the approach and the view that you have as you come around? Will you tell them whether there are curves, or just what is the approach along that highway as you turn across that grade crossing to go to Ellensburg? Will you just describe to the jury in your own words just immediately before this accident happened on Friday?

A. I always pull up there and slow down, shift down or something, to get up over that thing, because——

Q. You mean——

A. Shift down, it was a sharp bend coming up over and [100] hitting them plank, you had a very good chance of stalling your car if you didn't.

Q. What do you mean there is a sharp bend?

A. Well, you come up along parallel with the railroad, then you have to turn right up and cross the crossing.

Q. I see. Did you cross the crossing on a turn, or was there a straight or direct approach to it?

(Testimony of Ernest Everett.)

A. Turn across it on a turn. That is the reason you had to practically slow down at the crossing.

Q. I see. And had you crossed the crossing a number of times before that? A. Yes, sir.

Q. And what was the condition, generally, of the approach next to that planking? Was it good or was it bad?

A. I would say it was bad.

Mr. McKevitt: Object to the form of that question. He can describe the condition.

The Court: Yes, I will sustain the objection.

Q. (By Mr. Etter): All right, what was the condition during the times you had been using it?

A. I would say it was bad.

Mr. McKevitt: Object to that and move that the answer be stricken and the jury instructed to disregard it.

Mr. Etter: He can certainly say what he thought about it. [101]

The Court: Well, I think he should describe it. "Bad" doesn't mean anything.

Q. (By Mr. Etter): Tell us.

A. The gravel had been dug out from the cars, you see, in making that bend and had made—and that made a jump-up to get up on the railroad.

Q. A jump-up to get up on the crossing? How do you mean, now, a jump-up?

A. Well, you know, you had to hit them plank and, naturally, you would have to goose your car in order to hit them and make the turn beside.

(Testimony of Ernest Everett.)

You couldn't go across 40 miles an hour because you had to stop and pretty near make a turn.

Q. I see, to go over it? A. Yes.

Q. What was the condition, when you had driven over it the day before, as to visibility up to see a train coming the other way or coming up from under the underpass from the east to Ellensburg?

A. Very hard to see a train until you got on the crossing.

Q. And why was that?

A. Because you was going right with the railroad, parallel to the railroad track.

Q. Yes? [102]

A. You couldn't—

Q. And what else? What was the condition of the brush around and along the right of way?

Mr. McKevitt: On what particular day?

Q. (By Mr. Etter): On the day before this accident happened, when you drove to town?

A. It has been bad, been bad all the time.

Mr. McKevitt: I object to that answer, if your Honor pleases, and move the jury be instructed to disregard it.

Mr. Etter: You can't say it is bad; tell us what it looked like.

The Court: The jury will disregard the statement that was made that it was "bad." He can state in detail why he considered it bad.

Q. (By Mr. Etter): Give your opinion.

A. Grewed up with brush.

Q. Beg pardon?

(Testimony of Ernest Everett.)

A. Grewed up with brush all along there.

Q. I didn't hear you, Mr. Everett?

A. I say it grewed up, the brush along the right of way there.

Q. The brush had grown up, is that it?

A. Yes, made it harder.

Q. Could you see with ease through there back up to the [103] underpass or overpass on the day prior to this accident?

A. You could see if you got up on the crossing.

Q. I see.

Mr. McKevitt: What was that answer?

Mr. Etter: You couldn't until you got on the crossing.

Q. That was the condition on the day before the accident when you drove over there?

A. Yes, sir.

Q. Beg your pardon? A. Yes, sir.

Q. I see. Now, had these conditions, that is, the condition of the planking and the visibility with respect to the brush, had that existed there for sometime?

A. I suppose it had, been there ever since I had been there.

Q. I see. Well, now, tell me this, were there any signs, were there any signs——

A. Road signs?

Q. Road signs—just a moment—either on the south side, any road signs on the south side away and off of the main crossing indicating the pres-

(Testimony of Ernest Everett.)

ence of a grade crossing ahead on the day prior to this accident? [104]

A. What do you mean, what kind of signs?

Q. Well, any crossing signs saying "Railway Crossing Ahead"?

A. There was a railroad crossing sign there.

Q. Beg pardon?

A. There was a railroad crossing sign there. There was no stop signs.

Q. But what I am trying to get at, where was the railroad crossing sign at the crossing?

A. At the crossing.

Q. Yes, I am asking if there were any signs down toward your place? A. Oh, no, no.

Q. 20 or 30 or 40 feet along this highway, indicating that there was a railroad crossing ahead?

A. No.

Q. Beg your pardon? A. No.

Q. Where was the only sign?

A. The railroad sign on the other side of the crossing, and that was all.

Q. I see.

The Clerk: Marking Plaintiff's 14, 15 and 16 for identification, your Honor.

Q. (By Mr. Etter): Handing you the Plaintiff's Exhibit [105] No. 14 for identification, without going into details, will you tell me what that represents? A. Funeral expenses.

Q. Funeral expenses. That you and Mrs. Everett paid as a result of her death? A. Yes, sir.

(Testimony of Ernest Everett.)

Mr. McKevitt: If you will show them to me, Mr. Etter, maybe we can agree.

Mr. Etter: All right.

(Exhibits handed to Mr. McKevitt.)

Mr. McKevitt: No objection.

The Court: They will be admitted, then. Does that apply to 14, 15 and 16, then?

Mr. Etter: Yes, your Honor, 14, 15 and 16.

(Whereupon, the said bills were admitted in evidence as Plaintiff's Exhibits Nos. 14, 15 and 16.)

Mr. McKevitt: What do they total?

Mr. Etter: 14, 15 and 16. The 14 is \$463.60; 15—

Mr. McKevitt: What is that for?

Mr. Etter: Funeral expenses.

Mr. McKevitt: Funeral. [106]

Mr. Etter: And grave markers, \$267.50; stone and cemetery lot, \$101.66.

Mr. McKevitt: \$101.66?

Mr. Etter: That is correct.

Q. The Dodge truck that you had, Mr. Everett, were you able to realize anything on that truck after the accident? A. No, sir.

Q. Was it written off, or, rather, did you charge it off as a total loss?

A. It was a complete wreck.

Q. It was a complete wreck. You had had it how long, did you say?

A. Well, I got it in the fall of '50 before I came out here.

(Testimony of Ernest Everett.)

Q. The fall of what? A. '50.

Q. Before you came here?

A. Yes, to move out with.

Q. I see. What was its mechanical condition so far as your using it was concerned?

A. Seemed to run pretty good.

Mr. McKevitt: I didn't get the answer?

A. It run pretty good. I used it going to work all the time, back and forth to work. [107]

Q. (By Mr. Etter): You had used it continuously, had you?

A. Yes.

Q. Up until the time it was destroyed?

A. Yes.

Mr. Etter: I think that is all at the present, Mr. Everett.

The Court: Just a moment. There will be some cross-examination.

Mr. McKevitt: May I proceed with cross-examination?

The Court: Yes, you may proceed.

Cross-Examination

Q. (By Mr. McKevitt): Mr. Everett, with reference to the condition of the crossing itself, the planking, do I understand that the day following the accident you made some observations about its condition; is that correct?

A. I went to town the day before.

Q. Pardon?

(Testimony of Ernest Everett.)

A. I had crossed it the day before on the Friday.

Q. You went back and made some measurements, I understood?

A. Oh, yes, afterwards.

Q. When was that, please?

A. About a week afterwards.

Q. About a week afterwards? [108]

A. Somewhere along there.

Q. Did you make any observation of the planking condition when you went up there immediately following the unfortunate death of your daughter, that day?

A. Measured the plank with a ruler I had in the car there.

Q. At that time? A. At that time, yes, sir.

Q. What you are talking about is the planking on the outside of the rail, aren't you?

A. Yes, sir.

Q. Toward your home? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. And the width of the planking was what; that is, outside planking, what was the width that you measured it?

A. Well, I think they are around about 14 inches, the planks. Oh, you mean the thickness?

Q. The thickness?

A. Oh, yes, four inches.

Q. Four inches, and about 14 inches wide?

A. Yes.

Q. Now, you say that some dirt on that plank-

(Testimony of Ernest Everett.)

ing, that outside planking, had been kicked away so there was some [109] kind of a depression as you went over it; is that correct? A. Yes.

Q. And did that depression extend the full length of this outside planking? A. Yes, sir.

Q. And you made a very thorough examination of the planking on that day? A. Yes.

The Clerk: Defendant's 17 and 18 for identification.

Mr. McKevitt: Now, with reference to Defendant's Exhibits 17 and 18 for identification, I have shown these to Mr. Etter and I think I am correct in saying that he will stipulate there is no necessity for their identification and that they were also taken on the 10th of March, two days after the accident.

Mr. Etter: That is correct, and I so stipulate and have no objection.

The Court: All right.

Q. (By Mr. McKevitt): Showing you Defendant's Exhibit 17, will you please examine that?

A. This was taken——

Q. The camera is east of the crossing, showing a close-up of the crossing and view to the west. That is looking toward the west, you see. [110]

A. Looking to the west?

Q. Yes.

A. This would be on the west side, is that it?

Q. Well, you are looking——

A. Well, we are looking west, but this is the approach on this, going——

(Testimony of Ernest Everett.)

Q. Yes.

A. —going north?

Q. On the left-hand side of the photograph, you are going north away from your house.

A. Yes, I see, uh-huh.

Q. Is that a fair representation of the condition of that crossing as it existed on March 8th of 1952?

A. I would say maybe a fair, yes.

Q. Well, is it a good representation of the condition that existed on that date, two days after the accident, it was taken, this photograph, it happened this photograph was taken?

A. Plain view, that is a very plain view, very plain.

Q. You would say it is a fair representation?

A. Yes.

Mr. McKevitt: Offer it as part of the cross-examination of this witness.

The Court: That is 17, isn't it?

Mr. McKevitt: Yes, your Honor. [111]

The Court: It will be admitted.

(Whereupon, the said photograph was admitted in evidence as Defendant's Exhibit No. 17.)

Mr. McKevitt: May I offer it to the jury and pass it along?

Mr. Etter: Well, counsel, I was going to suggest, I thought we would try to get all of these pictures in and if we could agree to let the jury take 15 minutes in the morning and look at all

(Testimony of Ernest Everett.)

the pictures so we don't have to keep passing them around. I didn't do that because I thought it would be slower. I have a whole bunch of them.

Mr. McKevitt: I will abide by whatever his Honor thinks is necessary to expedite the trial.

Mr. Etter: I should like to get an agreement from you on that to expedite the matter. When we have all the exhibits in, the jury may have an opportunity while we are not in the middle of an examination to avoid distraction by examining them all.

The Court: I think there are disadvantages to that, too. If you wait too long after the explanatory testimony is given, it is going to be difficult for the jurors to remember which picture is which and what it represents, so I [112] think if either counsel wishes to, just start in and pass them all around and take the time to do it.

Mr. Etter: All right, your Honor, I think I will do that.

The Court: The order in which they are numbered there, if that is the order you want them to go around.

(All photographic exhibits handed to jury.)

Mr. McKevitt: I will wait this examination by the jury, then.

The Court: Yes, I think that perhaps that would be the most orderly way, just give the jurors an opportunity to look at them one at a time and pass them along.

Mr. Garber, if you will just look at them and

(Testimony of Ernest Everett.)

then as you have finished with one, pass it along, we will keep them moving that way.

Mr. Etter: I might tell the jury, as to my photographs, if they will look on the back, they can tell what the photograph is about, and Mr. McKevitt has appended to his the direction that I have agreed may stay on there for the jury's guidance.

The Court: I see. If there is some explanatory matter on the back, I think they may look at it.

Mr. McKevitt: Is the jury finished, your Honor?

The Court: You may proceed when you are ready.

Mr. McKevitt: I was waiting, I didn't know the jury is finished. [113]

The Court: The back row haven't quite finished.

Mr. McKevitt: Shall I wait?

The Court: Yes, might as well wait.

All right, Mr. McKevitt, you may proceed.

Mr. McKevitt: Thank you, your Honor.

The Clerk: Your Honor, these defendant's photographs that I have now marked commence with No. 19 and end with No. 31.

The Court: What was 18?

The Clerk: 18 is one of the others.

Mr. McKevitt: I am getting to 18 right now.

The Court: All right. And how far do they go?

The Clerk: Through 31.

The Court: All right.

Mr. McKevitt: Offer as part of the cross-examination of this witness Defendant's Exhibit 17 for identification.

(Testimony of Ernest Everett.)

Mr. Etter: No objection.

The Court: It has been admitted.

Mr. McKevitt (To the jury): You can pass that along, if you will.

Q. Showing you Defendant's Exhibit No. 18 for identification, your counsel has stipulated that that photograph was taken March 10th, two days after the accident, and [114] in that the camera is west of the crossing and facing toward the east.

Now, will you examine that, please?

A. That is on the west side of the crossing?

Q. The camera is west of the crossing and looking toward the east.

A. Toward the underpass?

Q. That's right.

A. Where is the camera sitting?

Q. Well, it is in about the center of the track. Is that a fair representation? A. Yes.

Q. Of the condition of that crossing as it existed on March 8th?

A. From the center of the track, not from the approach of the track.

Q. I am talking about the outside planking?

A. It is taken from the center of the track?

Q. That's right. A. Yes, sir.

Q. That is a fair representation?

A. Yes, sir.

Mr. McKevitt: Offer it as part of the cross-examination of this witness.

The Court: It will be admitted, then. That is 18, [115] isn't it?

(Testimony of Ernest Everett.)

Mr. McKevitt: Yes, your Honor.

(Whereupon, the said photograph was admitted in evidence as Defendant's Exhibit No. 18.)

Q. Now, Mr. Everett, if I understood your testimony correctly, you stated that one approaching that crossing that date, as your daughter did, would not have any view of that track toward the east, toward the viaduct, until the truck got where, how far from the crossing? Did you say almost on it?

A. Almost on it.

Q. Well, do you mean on it, or what do you mean by almost?

A. Well, practically on the crossing.

Q. Well—— A. The approach.

Q. Assuming the front end of the truck was 10 feet from the nearest rail, what view toward the Milwaukee viaduct would one have if they looked in that direction? How far up the track could they see if the front end of the truck was 10 feet from there on into the crossing, how far up the track could they see on March 8, 1952? [116]

A. To the east?

Q. Yes, the direction from which this train came?

A. Well, you couldn't see very far.

Q. Well, could you see any distance up the track?

A. Might see a little ways, probably.

Q. You have in mind, now——

A. Because you was still on the turn.

(Testimony of Ernest Everett.)

Q. Understand my question——

A. You are still making the turn.

Q. Assuming that on March 8, 1952, you were driving this Dodge truck and you stopped it with the front end of the truck 10 feet from the closest rail and you looked to the east, how far up that track could you see, if you could see up the track at all?

A. Well, if you stopped and looked, twisted your head around and looked, you probably could see up there quite a little ways.

Q. Well, when you are 10 feet from the track, the approach, as you will notice by this map, is almost at right angles, isn't it, to the track?

A. In crossing the track at 10 feet, huh?

Q. When you are 10 feet from the track, you are almost at right angles to the track, is that right?

A. Well, I suppose you was making a right angle at that distance. [117]

Q. Well, now, you stop your truck 10 feet from that track—she was going north, wasn't she?

A. Yes.

Q. And that train is coming from the west, isn't it?

A. From the east.

Q. From the east? A. Yes.

Q. So what she would be doing driving north, she would look to the east. Now, if when she got 10 feet from that, with the front of her truck 10 feet from the track, she looked in that direction, she could have seen that train clear back beyond

(Testimony of Ernest Everett.)

the Milwaukee viaduct, couldn't she? You know that to be the fact? A. I don't think so.

Q. You don't think so. And isn't—

A. Because you was coming up a raise there to make that bend.

Q. I am assuming all of the conditions that existed there on March 8, 1952, and you said you had been over the track the day before it, hadn't you?

A. Yes.

Q. In this truck? A. Yes.

Q. The same truck. And the conditions on March 7th were the same as they were on March 8th, weren't they? [118] A. Yes.

Q. Well, assuming that on the day before you were driving that truck, isn't it a fact that when the front end of your truck gets 10 feet from the closest rail, you can see up that track over a thousand feet, can't you?

A. Well, I never measured it, I couldn't say just how far you can see up there.

Q. Can you see 500 feet up the track?

A. If you get on the crossing, you can see the whole length of the track.

Q. I am not talking about that, I am talking with the front end of the truck 10 feet from the closest rail. A person in that Dodge truck, sitting where she was sitting, could see up that track at least a thousand feet or more, couldn't they?

A. Well, I couldn't say to that just how far you could see.

Q. Can you give the jury any idea, under those

(Testimony of Ernest Everett.)

conditions, how far you could see up that track, if at all?

A. I know when you get on the crossing, you can see the whole length of the track. Probably if you got your front wheels on it, you could see.

Q. Well, then, I won't pursue it. Are you unable to answer, under the conditions I have described, when the front end of the truck is 10 feet from the closest rail? [119]

A. When you are making a bend, it is pretty hard to turn your head and look back.

Q. But you are not making any bend when you are 10 feet from the track, you are almost at right angles to the track. A. At ten feet?

Mr. Etter: Just a minute, just a minute. You are assuming something that isn't in the proof and isn't on the map, Mr. McKevitt.

Mr. McKevitt: Look at the map.

Mr. Etter: Go look at it.

The Court: Proceed with the examination.

Q. (By Mr. McKevitt): One inch on the map, Mr. Everett, equals 20 feet on the ground. Isn't it a fact when the truck comes up there and its front end is 10 feet away, it is almost at right angles to the railroad track? A. At 10 feet?

Q. Yes. A. According to that map.

Q. Well, all right, then, the train is coming in this direction, the truck is going in that direction. All she would have to do is turn her head to the right and she can see up that track on that date for over a thousand feet, with the front end of

(Testimony of Ernest Everett.)

that truck 10 [120] feet from the closest rail? Now, isn't that the fact? A. (No response.)

Q. Pardon me?

A. I couldn't say, I never measured just how far you could see.

Q. And isn't it a fact that when a driver such as she was on that date, that when she is 20 feet from that rail, by a slight turn of her head she has a clear view up that track clear to the Milwaukee underpass and further, isn't that right, at 20 feet?

Mr. Etter: I am going to object to the form of these questions. He might ask him about his experience. These assumptions about if she turned her head slightly is without any definition of slight or anything else on those hypothetical questions. I have no objection to him asking Mr. Everett if he was driving and he turned such and could or could not see, but I don't know how we could assume——

The Court: Well, I think that objection is well taken.

Q. (By Mr. McKevitt): Well, assuming then, that the day of this accident you were driving that same truck, isn't it a fact that when the front end of that truck was 20 feet from the closest rail, that there is no obstruction to view up that track clear to the Milwaukee viaduct and further? Now, that is the truth, isn't it? [121]

A. I wouldn't say that.

Q. Well, can you give us any idea?

A. Still making a bend, you can't see when you

(Testimony of Ernest Everett.)

are making a bend until you start across the track.

Q. Is it your——

A. You are below the track when you——

Q. Is it your testimony that before anyone could have seen that train approaching on that date, that a portion of that truck had to get on the closest rail? Is that your testimony?

A. Before you could see, you mean?

Q. Yes, before you could see the engine?

A. I imagine the front end would have to be on that rail.

Q. I want to show you Defendant's Exhibit No. 20 for identification, or No. 19, rather, and it is agreed that the camera in that instance was 250 feet east of the crossing, sec. That is looking in the direction in which the train was going, 250 feet east of the crossing, and it is facing west. Now, that is a fair representation of the condition of the track and the vegetation on either side there, isn't that true? A. Yes.

Q. Isn't that correct?

Mr. McKevitt: Offer it as part of the cross-examination of this witness. [122]

Mr. Etter: Let me take a look at it, just a minute.

I have no objection.

The Court: It will be admitted.

(Whereupon, the said photograph was admitted in evidence as Defendant's Exhibit No. 19.)

(Testimony of Ernest Everett.)

Q. (By Mr. McKevitt): Examine Defendant's Exhibit No. 20, and it is agreed between counsel and myself that at that point the camera is 300 feet east of the crossing facing west. That is a fair representation of the track and the vegetation as it existed on March 8, 1952, the date of the accident, is it not? A. Yes, sir.

Mr. McKevitt: Offer it in evidence.

Mr. Etter: No objection.

The Court: It will be admitted, Defendant's 20.

(Whereupon, the said photograph was admitted in evidence as Defendant's Exhibit No. 20.)

Q. (By Mr. McKevitt): Showing you Defendant's Exhibit [123] No. 21 for identification, it is agreed between your counsel and myself that was taken, all these photographs, two days after the accident happened. There the camera is 350 feet east of the crossing and facing west. That is a fair representation of the track and the conditions on either side, is it not, as they existed on the day of the accident? A. Yes.

Mr. McKevitt: Offer it in evidence.

Mr. Etter: No objection.

The Court: It will be admitted.

(Whereupon, the said photograph was admitted in evidence as Defendant's Exhibit No. 21.)

Q. (By Mr. McKevitt): Showing you Defend-

(Testimony of Ernest Everett.)

ant's Exhibit No. 23 for identification, it is stipulated between us and your counsel that there the camera is 450 feet east of the crossing facing west. That is a fair representation of the conditions existing on that date, track and on either side, is it not?

A. Yes, sir.

Mr. McKevitt: Offer it in evidence.

Mr. Etter: No objection. [124]

The Court: It will be admitted.

Q. (By Mr. McKevitt): Showing you Defendant's Exhibit 23, and it is stipulated that was also taken two days after the accident——

The Court: You mentioned that last one as 23. I wondered if you had intended to skip 22?

Mr. McKevitt: 22, your Honor, I made a mistake, that last one was 22.

The Court: That was 22 and now you have 23. All right, 22 will be admitted, then.

Mr. McKevitt: I beg your pardon, this is 23.

The Court: Yes, all right.

(Whereupon, the said photograph was admitted in evidence as Defendant's Exhibit No. 22.)

Q. (By Mr. McKevitt): That is a fair representation of the conditions that existed on that date, is it not? A. Yes, sir.

Mr. McKevitt: Offer it in evidence.

Mr. Etter: No objection.

The Court: It will be admitted. [125]

(Testimony of Ernest Everett.)

(Whereupon, the said photograph was admitted in evidence as Defendant's Exhibit No. 23.)

Q. (By Mr. McKevitt): Showing you Defendant's Exhibit 24 for identification, it is stipulated the same, the camera there is 500 feet east of the crossing facing westward, taken two days afterwards, and that is a fair representation of the conditions that existed on the date of the accident, is it not? A. Yes, sir.

Mr. McKevitt: Offer it in evidence.

Mr. Etter: I have no objection.

The Court: It will be admitted.

(Whereupon, the said photograph was admitted in evidence as Defendant's Exhibit No. 24.)

Q. (By Mr. McKevitt): Showing you Defendant's Exhibit No. 25 for identification, it is stipulated that the camera there was 600 feet east of the crossing facing westward. That is a fair representation of the conditions existing on the day of the accident, is it not? A. Yes, sir. [126]

Mr. McKevitt: Offer it in evidence.

Mr. Etter: I have no objection.

The Court: It will be admitted.

(Whereupon, the said photograph was admitted in evidence as Defendant's Exhibit No. 25.)

Q. (By Mr. McKevitt): Showing you Defend-

(Testimony of Ernest Everett.)

ant's Exhibit No. 26, and it is stipulated that that was taken two days after the accident and the camera is 700 feet east of the crossing facing westward, and that is a fair representation, is it not?

A. Yes, sir.

Q. And those structures on either side are the sidewalls of the Milwaukee underpass, are they not?

A. Yes, sir.

Mr. McKevitt: Offer it in evidence.

Mr. Etter: No objection.

The Court: That was 26, wasn't it?

Mr. McKevitt: 26, your Honor.

The Court: It will be admitted, then.

Mr. Etter: Yes, 26, your Honor. [127]

(Whereupon, the said photograph was admitted in evidence as Defendant's Exhibit No. 26.)

Q. (By Mr. McKevitt): Showing you Defendant's Exhibit for identification 27, it is stipulated that was taken two days after the accident, the camera 900 feet east of the crossing. That is a fair representation, is it not, of the conditions existing that day?

A. Yes, sir.

Q. And the structure there shown *in* the Milwaukee overpass, is it not?

A. Yes, sir.

Mr. McKevitt: Offer it in evidence.

Mr. Etter: No objection.

The Court: It will be admitted.

(Whereupon, the said photograph was admitted in evidence as Defendant's Exhibit No. 27.)

(Testimony of Ernest Everett.)

Q. (By Mr. McKevitt): Showing you Defendant's Exhibit No. 28 for identification, and in that picture the camera is 1,000 feet east of the crossing facing westward, that is a fair representation of the conditions, is it not? [128] A. Yes, sir.

Q. On the date of the accident. And that also shows the Milwaukee overpass, doesn't it?

A. Yes, sir.

Mr. McKevitt: Offer it in evidence.

Mr. Etter: No objection.

The Court: 28 will be admitted.

(Whereupon, the said photograph was admitted in evidence as Defendant's Exhibit No. 28.)

Q. (By Mr. McKevitt): Defendant's Exhibit No. 29 for identification, the camera 1,400 feet east of the crossing facing westward, and that is a fair representation of the conditions that existed on the day of the accident? A. Yes, sir.

Mr. McKevitt: Offer it in evidence.

Mr. Etter: No objection.

The Court: 29 will be admitted.

Mr. Etter: Oh, pardon me just one moment. Yes, no objection. [129]

(Whereupon, the said photograph was admitted in evidence as Defendant's Exhibit No. 29.)

Q. (By Mr. McKevitt): Showing you the Defendant's Exhibit No. 30 for identification, which

(Testimony of Ernest Everett.)

is a panoramic view, a combination of several pictures, 1, 2, 3 and 4 are several pictures facing east and north, camera 25 feet south of the crossing, will you examine that panorama, please, having in mind this is the direction in which your daughter is traveling (indicating)?

A. The camera was 25 feet——?

Q. The camera is 25 feet from the crossing.

Mr. Etter: All four pictures in the panoramic view, Mr. McKevitt?

A. The camera was in here, then (indicating)?

Q. (By Mr. McKevitt): Yes, 25 feet. Isn't that a fair representation of the conditions that existed on that date?

A. Yes, sir.

Mr. McKevitt: Offer it in evidence.

Q. Now, showing you Defendant's Exhibit 31, which is a panoramic view consisting of three pictures and the camera is 180 feet south of the crossing, looking east and north. Will you examine that? It was taken two [130] days after the accident. Is that a fair representation of the conditions that existed on the day of the accident?

A. Yes, sir.

Mr. McKevitt: Offer it in evidence.

Mr. Etter: No objection.

The Court: All right, 30 and 31 will be admitted, then.

(Whereupon, the said photographs were admitted in evidence as Defendant's Exhibits Nos. 30 and 31.)

(Testimony of Ernest Everett.)

Mr. McKevitt: May I go into another subject?

The Court: I think I will just wait until the jury gets through looking at these pictures and then adjourn.

Mr. McKevitt: Very well, I won't go into it.

The Court: All right, members of the jury, I am going to excuse you until 10 o'clock tomorrow morning. Report back at 10 o'clock tomorrow morning for resumption of the trial, and please remember what I have told you about not discussing the case, either among yourselves or with anyone else. Just refrain from reading anything about it in the papers or any account of it on the radio. [131]

You may be excused now.

(Whereupon, the following proceedings were had out of the presence of the jury:)

The Court: It has been my practice to instruct the jury on damages that they can't award more than the amount claimed in the complaint. I have never been sure whether that applied to detailed amounts of special damages claimed, but I notice here, according to my calculation, your total amount for funeral expenses exceeds the amount claimed in the complaint, does it not? I think you allege in the complaint \$731.10, and my computation of your three items here is \$832.76.

I suggest, if you wish to claim the larger amount, that you amend the complaint by interlineation.

Mr. McKevitt: I would have no objection to the

amendment conforming to the bills that Mr. Etter has put in.

Mr. Etter: I will make that formal motion, then, that it be amended.

The Court: Yes. I suggest you better add those up or have the Clerk add those and put it in by interlineation in the complaint.

Mr. Etter: All right, your Honor.

The Court: That would be more accurate, probably, than my arithmetic. [132]

I am going to suspend this case until 10 o'clock, but I have another short matter to take up before that, so I will adjourn until 9:45 tomorrow morning.

(Whereupon, the trial in the instant cause was adjourned until 10 o'clock a.m., Tuesday, January 18, 1955.) [133]

(The trial in the instant cause was resumed pursuant to adjournment, all parties being present as before, and the following proceedings were had, to-wit:)

Mr. McKevitt: May I proceed, your Honor?

The Court: Yes.

ERNEST EVERETT,

plaintiff herein, having been previously duly sworn, resumed the stand and testified further as follows:

Cross-Examination (Continued)

Q. (By Mr. McKevitt): Mr. Everett, I believe you testified yesterday that Erna Mae was, at the time of her death, 16 years of age?

(Testimony of Ernest Everett.)

A. Yes, sir.

Q. And that she would have been 17 in April, the following month? A. Yes, sir.

Q. And she was born in Kalispell, Montana?

A. Yes, sir. [134]

Q. And you lived over there for how long?

A. I lived there practically all my life.

Q. Oh, you were a native of Montana?

A. Well, I was born in Texas, but I was about five years old when we came there.

Q. Well, you moved your family from Kalispell, do I understand you, direct to Ellensburg?

A. Yes, sir.

Q. And you arrived at Ellensburg, established your residence where you now reside, in 1950?

A. Yes, sir.

Q. In November of that year?

A. Well, I got here in October, I believe it was.

Q. In October?

A. I moved out there in November.

Q. And you have lived there continuously since that time? A. Yes, sir.

Q. Living there now? A. Yes, sir.

Q. Now, when you established your residence at Ellensburg, where did Erna start going to school?

A. At Ellensburg.

Q. In the fall of 1950? A. Yes, sir.

Q. In the high school? [135] A. Yes, sir.

Q. Now, how would she get to school? That is about four miles from Ellensburg, isn't it?

A. She took the bus from the highway there.

(Testimony of Ernest Everett.)

Q. That is the highway which parallels the railway crossing? A. Yes, sir.

Q. But in order to get to the highway, she would have to go over that railroad crossing, wouldn't she? A. Yes, sir.

Q. So she, for a period of a year and a half, that is, November of 1950 to March of '52, that period, she would go over that crossing at least twice a day when she was going to school?

A. Yes, sir.

Q. How would she get from her home to the highway?

A. Well, lots of times they walked and bad weather I would take them.

Q. When it was bad weather, you would drive her down in the car from the home, go up this road and over the crossing; is that correct?

A. Yes, sir.

Q. And then she would meet the bus. And you knew at all times, did you not, that from the time you established your residence there, that that was the main line of [136] the Northern Pacific Railway Company? A. Yes, sir.

Q. And you knew that it operated passenger trains and freight trains over that crossing day and night? A. Yes, sir.

Q. You knew that at the time?

A. Yes, sir.

Q. Your daughter knew it, also, didn't she?

A. Yes, sir.

(Testimony of Ernest Everett.)

Q. The weather on this particular day, March 8, '52, was clear, was it not? A. Yes, sir.

Q. No snow? A. No.

Q. No rain, visibility was good?

A. Yes, sir.

Q. Generally. You knew for a considerable period of time prior to this accident that that Northern Pacific passenger train went over that crossing somewhere between 2:30 and 3 in the afternoon; you knew that? A. Yes.

Q. Your daughter knew it?

A. Well, I suppose she did, I don't know.

Q. Well, weren't there occasions when you and she would be approaching that crossing prior to this date that [137] you would see that passenger train go by?

A. Well, it wouldn't be very often, if we did at all, because their school period wouldn't be connected at that time of day.

Q. This Dodge truck, you say, was a 1950 panel—1940? A. '40.

Q. Model. A panel truck? A. Yes, sir.

Q. Regular gear shift? A. Yes, sir.

Q. And you purchased that in 1950?

A. Yes, sir.

Q. Did you purchase it down at Ellensburg?

A. In Kalispell.

Q. Oh, you drove——

A. I drove it through.

Q. From Kalispell over? A. Yes.

(Testimony of Ernest Everett.)

Q. How many miles were on that truck at the time you bought it, do you recall?

A. Well, I don't remember, it was around—I couldn't say right offhand.

Q. It was about 10 years old when you bought it, is that correct?

A. I could say that they had a reconditioned motor in it. [138]

Q. Well, but it was 10 years old when you purchased it? A. Yes.

Q. And you purchased it from a second-hand dealer?

A. It was a dealer there, used car dealer, yes.

Q. But you don't recall what the mileage was on the truck when you bought it?

A. No, I couldn't say right now.

Q. It had been used considerably, had it not?

A. Well, it had been used quite a bit, it was 10 years old.

Q. You said it had a reconditioned motor in it?

A. Yes.

Q. When was that put in?

A. Well, it had about 8,000 miles when I got it—no, about 10, because I had to put the block number on after I got here in order to get the license off the old one.

Q. It wasn't a new motor, it was a reconditioned motor?

A. Well, I suppose it would be what you would call a reconditioned motor.

Q. Keep your voice up, it is rather hard to hear,

(Testimony of Ernest Everett.)

Mr. Everett. It was a reconditioning of the old motor?

A. It would be an old motor.

Q. Is that correct?

A. Well, it would be what you would call a new motor, wouldn't it, worked over? [139]

Q. I see. Well, all right. Now, on this particular afternoon of March 8th and before Erna started to get the mail in that truck, where were you working?

A. Well, I was tearing out an old bridge just out in front of the house.

Q. Now, your house sits back from that county road, does it not? A. Yes, sir.

Q. That is, toward the Ellensburg side, isn't that right? A. Yes.

Q. And how far back does your house sit from the county road?

A. Well, I estimate somewhere near a quarter of a mile.

Q. A quarter of a mile?

A. Somewhere along there.

Q. And you have a fence, do you not, right near the county road? A. Yes, sir.

Q. And the gate there? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. And you keep that gate closed?

A. Well, at this time it was open. I had been working in the road. [140]

Q. And where was the truck situated when Erna got into it to go and get the mail?

(Testimony of Ernest Everett.)

A. It was sitting right out in front of the house.

Q. And from the gate to the crossing, did you estimate that distance for us yesterday as being a half a mile?

A. In that neighborhood, I would say.

Q. So what she did, then, was drive approximately a quarter of a mile from the house to the gate, is that correct? A. Yes.

Q. And then a half a mile from the gate to the crossing, is that true? A. Yes, sir.

Q. Did you suggest to her that she get in the truck and go and get that mail?

A. She came out of the house and went down there and asked if she could use the car to get the mail.

Q. And in order to get the mail, she had to cross over that crossing? A. Yes, sir.

Q. And where was this mail box situated, or was it a mail box?

A. Over by O'Neill's house.

Q. Over by O'Neill's house. This house that is shown on the map? [141] A. Yes, sir.

Q. So you granted her, then, the permission to use the truck to go and get the mail?

A. Yes, sir.

Q. And did you have some further conversation with her? A. No, sir.

Q. You knew that that passenger train was due by there any moment, didn't you?

A. Well, I was working at the time and I, like

(Testimony of Ernest Everett.)

anybody else, didn't never look to see what time it was. I was working around there, didn't pay any attention to the time.

Q. Well, my question is, didn't you know at that time that that passenger train had not gone by and it was due over that crossing any moment?

A. No, I never, working, I never give it a thought, really, what time it was.

Q. Did you admonish Erna or caution her——

A. Oh, yes.

Q. ——when she left the house to be careful, watch out for that train? You told her that, didn't you?

A. Yes, I told her to watch out for trains.

Q. Told her to watch out for that train?

A. Not any particular train. I never give it a thought what time it was. [142]

Q. Well, didn't you specifically refer to the passenger train, in substance to her say "Watch out for that passenger train"?

A. There could be trains coming either way, you know.

Q. Well, what I am getting at is this: Do you recall cautioning her to watch out for that passenger train, the one that struck her, it was due there most any time?

A. Well, if I had had that in my mind, I would probably have held her up, but it come so quick, you see, that I never realized what time it was.

Q. Well, you went down to the crossing, of

(Testimony of Ernest Everett.)

course, when you were apprised of this unfortunate tragedy, didn't you? A. Yes, sir.

Q. And there were quite a few people or several gathered around there, were there not?

A. Yes, sir.

Q. Three O'Neills were there. You know the O'Neills, don't you? A. Yes, sir.

Q. Know them very well?

A. Well, pretty well, especially the one that lives there.

Q. Well, there is Larry and John, and what is the one? Lee? [143]

Mr. Etter: Leo.

Q. (By Mr. McKevitt): Do you know them all?

A. Yes, sir.

Q. What O'Neills did you see there at the crossing when you got there?

A. Well, I didn't see any of them when I got there.

Q. Did you see any state highway patrolman there?

A. Yes, I think there was a state highway man.

Q. Do you know Sheriff Dorsey?

A. Yes, sir.

Q. He was there? A. Yes, sir.

Q. They were there in their official capacity, were they not, in making an investigation?

A. Yes, I suppose.

Q. You had a conversation with Mr. Scobee, the engineer?

Stand up Mr. Scobee, will you please?

(Testimony of Ernest Everett.)

(Mr. Scobee stood up in the back of the courtroom.)

You saw him down there that day, didn't you?

A. I don't recollect ever talking to him. I remember talking to the conductor.

Q. Well, you inquired of somebody as to who the engineer of the train was, didn't you? [144]

A. Well, I don't remember that.

Q. And you don't remember, then, whether or not you talked to Mr. Scobee? A. No, I don't.

Q. Well, to refresh your recollection, didn't you, in substance inform the engineer that you had cautioned Erna that day to watch out for this passenger train; that it was due along there any moment, in substance, something like that, didn't you? A. You mean up there?

Q. Didn't you have that conversation with Mr. Scobee, didn't you tell him that?

A. I don't remember talking to Mr. Scobee.

Q. I see. Then, you have no recollection one way or the other? A. No.

Q. Is that correct? A. Yes.

Q. How long were you at the crossing, Mr. Everett?

A. Well, we got there just a little bit before the ambulance come, and I waited until the ambulance come and they took her away, and then Mr. Klocke took me home.

Q. Well, were you there 10 or 15 minutes?

A. Well, I couldn't say exactly the time because I—things passed pretty fast and I was excited,

(Testimony of Ernest Everett.)

pretty [145] hard to tell just how long I was there.

Q. Did you notice either the state highway patrolman or the Sheriff making any observations along the track there?

A. They were just standing there, I guess. I can remember——

Q. You don't remember whether you saw them making any observations? A. No.

Q. East of the crossing?

A. Not while I was there, I don't think they were.

Q. I see. Now, this tract that you have down there is how large? 80 acres?

A. There is 80 acres, yes.

Q. And you were doing some kind of work near the house? A. Yes, sir.

Q. And what kind of work was that?

A. It was tearing an old bridge out across the creek.

Q. Now, when Erna got in the truck and started driving toward the gate, did you watch the progress of the car up to the gate?

A. Well, see, I went about 200 feet out by the barn, I had another gate and I walked out there.

Q. I didn't get that? You went up 200 feet up to the barn? [146]

A. Somewhere near there. At the time at the barn, I had another gate and I walked out there and opened it for her and she went on through, and then I stood there, because I had just been working that road out to the county road, which

(Testimony of Ernest Everett.)

was a little bit slick yet, and see if she got—went along all right. And after she got through the gate on the county road, why, then I thought I heard something coming and I walked out further where I could see down toward the railroad and I saw the train come in there, and she was just going outside of the timber around by Mr. Klocke's.

Q. Well, you watched her progress from the time she left the house until she got to the gate, didn't you? A. Yes, sir.

Q. Then did she make a right-hand turn?

A. Yes, sir.

Q. And went along the county road toward the crossing? A. Yes.

Q. And after she got onto the county road, you followed her progress, do I understand you, until she disappeared from your view? A. Yes.

Q. And where did she disappear from your view with reference to the Klocke house?

A. Yes, right across from the Klocke house, they had some [147] timber there and some trees, and she disappeared behind that, and then on up further there was brush and stuff and I couldn't see any further.

Q. The Klocke house is on the same side of the highway, the Klocke residence is on the same side of the county highway as yours, isn't it?

A. Yes.

Q. And it is the first house immediately, we'll call it on the map direction, it would be immedi-

(Testimony of Ernest Everett.)

ately north toward the crossing, it is the first house? A. Yes.

Q. And did you measure any distance from the Klocke house up to the crossing?

A. Well, on the speedometer on the car.

Q. And what do you estimate that distance to be from a point on the county road opposite the Klocke home to the railroad crossing?

A. Three-tenths of a mile.

Q. Three-tenths of a mile. You clocked that on your speedometer? A. Yes.

Q. When did you do that?

A. Well, it was a short time afterwards.

Q. In preparation for this lawsuit?

A. Well, I—— [148]

Q. Well, it was after the lawsuit was started?

A. No, it was before that.

Q. Have you done it recently? A. Yes.

Q. Within the last week or so? A. Yes.

Q. In company with Mr. Etter, your attorney?

A. Yes, sir.

Q. And it showed three-tenths of a mile?

A. Yes, sir.

Q. Now, after she disappeared from your view, was it at that time that you had first some notice of the approach of this passenger train, is that right?

A. I didn't get the question.

Q. Your daughter was along the county road at some point when you saw this passenger train?

A. Oh, yes.

(Testimony of Ernest Everett.)

Q. For the first time? A. Yes.

Q. And that she was at a point, do I understand it, just about opposite the Klocke house, a little further toward the crossing, when you saw the train? A. Yes.

Q. And where was the train when you first saw it?

A. Well, it was coming just in sight down there by a billboard along the highway. [149]

Q. All right, but so we can locate it definitely on the map, Mr. Everett, if you please, was it what we call east of the old Milwaukee overpass in this direction toward Ellensburg? A. Yes.

Q. Down where that Northern Pacific whistle post is shown in these photographs, do you know where that is located? A. Yes, yes.

Q. With reference to that whistle post, where was the train? Was it toward Ellensburg?

A. Toward Ellensburg.

Q. Toward Ellensburg? A. Oh, yes.

Q. And after you saw that train, did it enter your mind then as to whether or not your daughter was going to reach the crossing before the train and get over it safely, or whether the train would reach it before she did; isn't that correct?

A. I figured she had plenty of time to get across the crossing, just my estimate.

Q. You were concerned about whether or not she would get over the crossing, weren't you, ahead of the train, or stop short of it, you were concerned about that? [150] A. Well——

(Testimony of Ernest Everett.)

Q. Weren't you?

A. I figured she would have plenty of time.

Q. Well, my question is, weren't you concerned about that? A. Probably was.

Q. Yes. How fast was she driving that truck when she disappeared from your view?

A. Well, just an estimate, I would say 25, 30 miles an hour.

Q. 25 to 30 miles an hour. And that is level county road in a straight direction until it gets about a couple of hundred feet or so from the crossing, isn't it? A. Yes.

Q. What would you estimate the distance that train was from the crossing when you first saw it?

A. I think it was about a mile and three-tenths.

Q. And you used that figure yesterday in your interrogation by Mr. Etter, a mile and three-tenths. You paced that off, didn't you? A. Yes.

Q. You and Mr. Etter with Mr. Connelly there?

A. Yes, sir.

Q. And you asked Mr. Klocke to go along, isn't that correct? [151] A. Yes, sir.

Q. And Mr. Etter, I believe he used the phrase of "checking and rechecking" that distance. Do you recall that? A. Yes, sir.

Q. In other words, you wanted to make certain that that measurement of a mile and three-tenths was correct? A. Yes, sir.

Q. And for the purpose of establishing where that train was when you first saw it. What the

(Testimony of Ernest Everett.)

speed of that truck was being driven by Erna, after she passed out of view, you don't know, do you?

A. No.

Q. Whether she increased it or slowed it down, you don't know that? A. No, sir.

Q. No. And you haven't been able to locate any witness that knew what her speed was after she got by the Klocke house? A. No, sir.

Q. And you have tried to find out if there were some witnesses that did know, isn't that correct? You have made investigations, naturally, haven't you?

A. Well, I don't—be pretty hard to tell how fast she was going even if they saw her going, wouldn't it?

Q. Well, you had information prior to the opening of this [152] trial that the O'Neills knew something about this accident, didn't you?

A. Yes.

Q. Is that correct? A. Yes.

Q. And you talked with them, didn't you?

A. Yes, sir.

Q. Yes. And you asked them what they saw and heard, didn't you? A. Yes, sir.

Q. And not one of them told you that they saw that truck driven by your daughter, not one of the three told you that they saw it approaching the crossing; isn't that correct? A. Yes, sir.

Q. And not one of them told you how long it was stalled on the crossing, isn't that correct?

A. That's right.

(Testimony of Ernest Everett.)

Q. And so far as you know, there is no one down in that neighborhood who knows how long that truck was stalled on that crossing; that is correct, isn't it? A. Yes, sir.

Q. What was the mechanical condition of the truck, generally, on that date?

A. Well, it had been a little hard to start. [153]

Q. What?

A. It was a little hard to start in the mornings, and prior to that one day I adjusted the carburetor a little bit, dirt or something got in there, and the Friday before I had taken it to town and it had run perfect.

Q. Mr. Klocke, as you say, you and he are close neighbors, aren't you? A. Yes, sir.

Q. As a matter of fact, his daughter would on occasions visit your daughter and on occasions she would visit at the Klocke home? A. Yes, sir.

Q. Mr. Klocke was up to the crossing that day, wasn't he? A. Yes, sir.

Q. Did you have any conversation with Mr. Klocke on that date about the condition of this truck that you recall, the mechanical condition of any portion of the mechanics of it?

A. I might have, I just can't recollect. We were talking about this and that and everything at the time, you know, excited.

Q. What is meant by the idling jet on that truck?

A. Well, that is to regulate your gasoline in the carburetor.

(Testimony of Ernest Everett.)

Q. It has reference to the carburetor? [154]

A. Yes.

Q. Well, you had a discussion with Mr. Klocke trying to figure out the reasons for that truck stalling on that crossing, didn't you? There was some discussion about that?

A. I might have had.

Q. I will ask you if at that time and on that date shortly after the accident and up near the crossing, in substance, you didn't inform Mr. Leo or Lee Klocke in substance this: The idling jet was plugged and at a slow speed the truck would stall? In substance, didn't you make a statement of that character to Mr. Lee Klocke?

A. Well, I never had it——

Q. He is in the courtroom, isn't he?

A. I never had it stall with me. Just in the mornings, it was cold, it would be hard to start. He must have misunderstood me on that phrase, because——

Q. Well, do I understand, then, that your answer is that you didn't make a statement of that character or similar thereto to Mr. Klocke? Is that your testimony?

A. Well, I might have said that I had had a little carburetor trouble, see, and prior to this, which I did, especially in starting the Dodge cars in the cold weather, they were hard to start. [155]

Q. Well, Mr. Everett, what I want to be sure of is as to whether or not, in substance, you did state to Mr. Klocke up there at the crossing that the

(Testimony of Ernest Everett.)

idling jet was plugged and that at slow speed the truck would stall?

A. Well, I may have said that, but it never stalled with me.

Q. Well, was the idling jet plugged on that date?

A. It was just—I figured it was just getting—you mean that day?

Q. Yes?

A. No, she got in the car and took right off. She didn't have a bit of trouble.

Q. Well, but it had—at slow speed on that date, would the truck stall?

A. Well, she drove out to the gate and slowed down and stopped. I opened the gate, went right ahead, never had a bit of trouble going out through that gate, and she had to come to practically a stop when I opened the gate.

Q. Well, put it this way: You are familiar with the general approach to that crossing from a point 200 feet back on that county road? You are familiar with the approach generally from about 200 feet into the crossing, aren't you? [156] A. Yes.

Q. Driven over it many, many times?

A. Yes.

Q. And you are familiar generally with the grade as you approach the crossing?

A. Yes, sir.

Q. And having in mind the nature of that grade there, what is the fact as to whether or not at a slow speed the truck might stall?

(Testimony of Ernest Everett.)

A. Well, it could, in making this raise and making that turn.

Q. Yes. Did I understand you correctly yesterday—if I am mistaken, tell me so—that in operating that truck over there generally, in reference to your description of the grade, that you customarily shift gears? A. Yes.

Q. What gear would you go into?

A. I generally run it in second.

Q. Low gear? A. Second.

Q. Second gear. Was that because of the grade or because of the condition of the truck or a combination of both?

A. Because of the grade and the jump-up there.

Q. Now, in addition to what you may or may not have said [157] to Mr. Klocke about this carburetor or an idling jet, didn't you advise him on that date that Erna was not very familiar with that truck, that she had not driven it that spring; didn't you so advise him?

A. She—that is the first time that spring she had driven it, because the snow had been on, just got the roads worked down and smoothed up and the snow was gone.

Q. Well, on how many occasions did she drive this truck over that crossing prior to this unfortunate day?

A. Well, I couldn't just remember all the times she had went the fall before, but she had went up there a good many times to get the mail in it.

Q. She had driven that same truck over that

(Testimony of Ernest Everett.)

same crossing a good many times to get the mail before the date of the accident, prior to the date of the accident?

A. The fall, that year before. It got bad weather, she never drove it after the snow came.

Q. You say she wouldn't operate the truck over the crossing during the winter weather?

A. No, I never let her take it when it was bad weather.

Q. Did she operate that truck over that crossing in the month of March of 1951?

A. No, I don't think so.

Q. You don't think so. You moved there in November of 1950, is that correct? [158]

A. Yes.

Q. Between November of 1950 and March of 1951, some five months, in that period of time did she ever operate that truck over that crossing toward the highway?

A. Between '51 and '52, the summer?

Q. Yes, November of 1950, which is when you moved down there, isn't it? A. Yes, yes.

Q. Between November of 1950 and March of 1951, some five months later, in that five months interval, did she operate that truck over that crossing?

A. No, I don't believe she did, because we had some bad weather just as soon as we moved out there.

Q. Well, I don't know whether you have told us or not approximately how many times she had

(Testimony of Ernest Everett.)

driven that same truck over that crossing in that direction?

A. Well, that would be hard for me to estimate. I never kept track of the times that she had went up there.

Q. Well——

A. She used to go up there and get the mail.

Q. Was it 10 times, would you say, at least?

A. Well, I would say at least that much.

Q. Was it 20?

A. Well, I couldn't say whether it was 20 times or not. [159]

Q. Why did she select this particular time of day to go and get that mail?

Mr. Etter: If you know.

Mr. McKevitt: If you know.

A. Well, it was Saturday afternoon and she was home and I was working, you know how kids like to go get the mail.

Q. Well, what I had in mind was, about what time the mail delivery would be made to this box?

A. Well, I don't just know just what time the mail comes in. It is after one o'clock that the mail comes in, but I——

Q. The mail comes out of Ellensburg, does it?

A. Yes.

Q. And how is it gotten out there?

A. By rural mail.

Q. By rural? A. Yes.

Q. And that is on a regular schedule, isn't it?

A. Yes.

(Testimony of Ernest Everett.)

Q. Every day? A. Yes.

Q. And that schedule, mail delivered is delivered at the mail box at what time in the afternoon?

A. Well, I don't know exactly because I never happened [160] to be right there when the mailman come. I have been there at one o'clock times and it hasn't come in.

Q. More than one delivery of rural mail a day at that time? A. Yes, sir, once a day.

Q. Once a day? A. Yes, sir.

Q. And that was a regular custom?

A. Yes.

Q. And on previous occasions when she would go to get the mail, would she leave about that time in the afternoon?

A. Well, just like she didn't happen to be doing anything or something and think about going and getting it, I suppose then she would go. If she happened to be doing something, why, at one certain time, she wouldn't be probably going at that time.

Q. I suppose, naturally, that not only she, but you and your wife, were interested to know whether or not each day there would be some mail coming to that box for delivery to your home or to be picked up by you people? A. Yes.

Q. Isn't that right? A. Yes, sir.

Q. And I suppose you made it a custom once a day or once every other day or two or three days, to go down and pick up your mail? [161]

(Testimony of Ernest Everett.)

A. When I was working, I always picked it up when I come home from work.

Q. Well, then, it was your custom to go into the mail box, either you or your daughter, or your wife?
A. Yes, oh, yes.

Q. How frequently a week, put it that way?

A. Go from home? Well, we always when I didn't work on a Saturday, we generally, somebody went up on Saturday.

Q. Well, would you let a week go by before you would look to see if you have any mail?

A. Well, when I was working during the week, I picked it up when I came home nights.

Q. Whether you picked it up on your way home or whether you went from your home to get it, did you average more than two or three times a week?

A. I picked it up every day.

Q. Every day, that is what I am getting at?

A. Oh, yes.

Q. And where were you working when you were not engaged on the farm? When you were doing other work, where were you employed?

A. In Ellensburg.

Q. In Ellensburg. And were you employed doing work in Ellensburg prior to this accident in March of 1952?
A. Yes, sir. [162]

Q. How would you go from Ellensburg—from your home to Ellensburg? In that truck?

A. Yes, sir.

Q. Was that the only automobile you had on the ranch?
A. Yes, sir.

(Testimony of Ernest Everett.)

Q. Did you ever authorize or permit knowingly Erna to drive that truck into Ellensburg?

A. No, sir. She never did.

Q. You only permitted her to use it when she would go get the mail?

A. Yes, on the county road there.

Q. Pardon me?

A. Just to go to the mail.

Q. Now, getting back to the train, Mr. Everett, when you saw it at that point a mile and three-tenths from the crossing, for what distance, if you are able to tell us, did it remain in your view?

A. Well, I think just about up to the whistle post, I could still see it, I think.

Q. From where you were standing on that date, it is your best recollection that after it got by the whistle post, some 1,320 feet east of the crossing, it passed out of your view?

A. Yes, there was brush along there, you see, that I [163] couldn't see. In that neighborhood, I couldn't say exactly just——

Q. And, at least, you couldn't see it immediately before it passed under the Milwaukee overhead or after it got under it you couldn't see it then?

A. No, no.

Q. You say that sometime there you heard, as I believe you described it, two or three toots. You are referring now to the whistle, aren't you?

A. Well, I thought I heard two or three toots.

Q. Well, you used that expression, don't you recall yesterday, two or three toots? A. Yes.

(Testimony of Ernest Everett.)

Q. You heard those two or three toots how long after you first saw this train a mile and three-tenths away?

A. Well, after it went out of sight. I don't know just where it was at.

Q. Well, it went out of your sight when it got by the whistle post, is that right?

A. Somewhere along there.

Q. And after it got by the whistle post is when you heard these two or three toots, isn't that right?

A. Yes, sir.

Q. And where the train was at that time, you don't know? A. No. [164]

Q. But the two or three toots that you heard were the whistle on that locomotive, wasn't it?

A. Yes.

Q. You could hear it very distinctly where you were, couldn't you? A. Yes, sir.

Q. How long was it after you heard these two or three toots that, in some manner or other, you got information that something might have happened or did happen up at that crossing? How long was it after you heard the engine whistle?

A. Well, I couldn't say. I waited there quite awhile until I figured she had time enough to be on her way back and I didn't see nothing of her, and so then I decided something might have happened and I started up the road.

Q. In other words, no one told you that anything had happened at that crossing, did they?

A. No, sir.

(Testimony of Ernest Everett.)

Q. You had no conveyance of your own to take you to the crossing? A. No, sir.

Q. So then a very short time after Erna left, you decided to go up to the crossing, didn't you?

A. I figured that she—waited until she had time to show [165] up in sight, then I figured she had time enough to be back.

Q. Well, my question is, within a very short time after the truck disappeared from your view, you decided to go up to that crossing, didn't you?

Mr. Etter: I will object to that question. He has already answered in the best way he can that he gave her time enough to get back, and counsel is still insisting, by a leading and suggestive question, a very short time. That is counsel's statement and not the answer of the witness.

Mr. McKevitt: Oh, I am cross-examining.

The Court: Proceed. I think he may answer.

Mr. McKevitt: All right.

Q. Within a very short time after Erna disappeared from your view near the Klocke home, you decided to go up to that crossing, didn't you?

Mr. Etter: The question is repetitious. I will object on that ground, too. That is the third time——

The Court: Well, I am not sure he has answered directly. You may answer.

A. Well, I couldn't say exactly how long it was before I started up there. I figured she had time enough to come back in view before I left.

Q. (By Mr. McKevitt): Well, what caused you to start up toward that crossing? What happened?

(Testimony of Ernest Everett.)

A. Well, things could happen, you know, in your mind, when anything like that——

Q. No one phoned you? A. No.

Q. That anything had happened? No one told you that anything had happened?

A. But I saw the train and, you know, you just in my mind that something could have happened.

Q. And you started on foot and you went out through the gate, did you not? A. Yes, sir.

Q. I suppose you were running, weren't you?

A. No, I was walking.

Q. And how far did you walk?

A. Well, I got up just about to Klocke's gate when somebody came along in a car.

Q. And who was that?

A. I think his name was Whitson, or some such name, picked me up and took me back up there.

Q. Whitson?

A. Whitson, I think that was it.

Q. Did you know him before this accident?

A. No, I didn't.

Q. He drove you up to the crossing? [167]

A. Yes.

Q. Before you got to the crossing and before you could see the crossing, were you advised by anyone that this passenger train had struck the truck? Before you got there, did you know that?

A. Well, they told me something had happened, you see.

Q. Who told you that?

A. This man in the car, Whitson.

(Testimony of Ernest Everett.)

Q. Where did he come from? Some place towards the county road away from the crossing, didn't he?

A. I don't know whether he came down the highway or where, but he came along about that time and I guess he must have stopped there.

Q. Well, was he driving up there to go to the crossing to find out, did he tell you that, what had happened, if anything?

A. Well, he just told me that something had happened, that somebody had told him, must have told him, where I lived, and he volunteered to come down to get me, is the only way I could——

Q. Pardon me, have you finished?

A. That is the only way I could see.

Q. From what conversation you had with Mr. Whitson, you got the information that this train had hit a truck, some truck, up there; isn't that correct? [168] A. Yes, sir.

Mr. McKevitt: May I confer with Mr. Thomas a brief moment?

The Court: Yes.

Q. (By Mr. McKevitt): Mr. Klocke, it is a fact, is it not——

Mr. Etters: Mr. Everett.

Mr. McKevitt: Or Mr. Everett, thank you, Mr. Etter.

Q. Mr. Everett, it is a fact, is it not, that on the day that Erna met her unfortunate death and prior to that time, she did not have a license to operate a motor vehicle?

(Testimony of Ernest Everett.)

Mr. Etter: I will object to that question, of course, because there is no causal relationship shown. Whether she did or whether she didn't have, it is a question of contributory negligence on the facts and circumstances of the evidence.

Mr. McKevitt: We have authority on it, if your Honor wishes to hear it.

Mr. Etter: I would like to hear it.

The Court: Well, it is about time for the morning recess, I will excuse the jury for the morning recess.

(Whereupon, the following proceedings were had out of the presence of the jury.) [169]

The Court: I am not sure who has the affirmative of the issue here. Do you wish to proceed, Mr. McKevitt?

Mr. McKevitt: Preliminary to the brief statement I will make on the law question touching this point, your Honor will recall that I have alleged affirmatively not only the negligence of the girl, but the negligence of the father.

The Court: Yes, I notice you have alleged both negligence of the deceased and negligence of the plaintiff.

Mr. McKevitt: And since no motion was directed toward the affirmative defense, this evidence is admissible, if it is proper at all. That is my viewpoint.

The Court: I see.

Mr. McKevitt: The case that I direct your Honor's attention to as authority for this proposi-

(Testimony of Ernest Everett.)

tion is the case of *Atkins vs. Churchill*, 30 Washington (2d), Page 859, the case having been decided June 1, 1948, and Syllabus 14 is as follows:

“The act of the owner of an automobile in entrusting it to two minors under the age designated by the statute constituted negligence per se.”

Now, in the body of the opinion and touching that [170] question, beginning at Page 865, the Court says:

“In addition, there was affirmative evidence to warrant submission to the jury of the question of negligence of appellant in entrusting his automobile to an unlicensed minor.”

And then it cites a case from 183 Washington, 162, and an annotation of 68 A.L.R. In that annotation is collected the cases which support the general rule that:

“The owner of a vehicle who entrusts the vehicle in the hands of an unfit person, thereby enabling the latter to drive it, may be held liable for an injury negligently inflicted by the use made of the vehicle by its driver as a proximate result of the incompetency or unfitness of the driver, although the use being made of the vehicle at the time of injury was beyond the scope of the owner’s consent.”

And more particularly now this language:

“The authorities uniformly hold that it is negligence per se for the owner of a motor vehicle to entrust it to a minor under the age specified by statute. The prohibitory enactment itself constitutes

(Testimony of Ernest Everett.)

a conclusive [171] declaration that an individual younger than the age designated is incompetent to drive a motor vehicle."

The Court: What is the minimum age at which a minor can get an automobile driver's license in the State of Washington?

Mr. Etter: 16.

The Court: It is 16?

Mr. Etter: Yes.

The Court: Except for some purposes they can get it for driving to school at 15.

Mr. Etter: Yes, they can get a permit.

Mr. Connelly: They can get a permit and farm people can get a permit to drive when younger for exclusive use on, I believe, secondary county roads and around the farm.

Mr. McKevitt: But this young girl on this occasion, I don't think counsel take the position that she falls within any special provision of the statute. In the Revised Code, it is 4620.

The Court: R.C.W.

Mr. McKevitt: It is that new gadget that I don't use very often because I don't know much about how to find things in it. 46.20-20, Operator's License, and so on. The heading is, "Unlawfully Permitting Child to Operate:"

"It shall be unlawful for a person to cause [172] or knowingly permit his child or ward under the age of 18 years to operate a motor vehicle upon a public highway as a vehicle operator, unless such

(Testimony of Ernest Everett.)

child or ward has first attained a vehicle operator's license."

Mr. Etter: My daughter is 16 and she has got a valid operator's license.

The Court: Beg pardon?

Mr. Etter: My daughter, I say, is 16 and she has a valid operator's license issued by the State Patrol.

The Court: It seems to me there are two things here involved. One would be a situation where the child is of the age where she couldn't get a license——

Mr. Etter: Right.

The Court: The other is where the minor is of the age where it would be possible to get a license, but she doesn't have one.

Mr. McKevitt: And that is where she falls within the prohibition of this statute.

Mr. Etter: Oh, no.

The Court: If she simply failed to get the license, then I think in order to avail yourself of the negligence of the father, you would have to show she was incompetent to drive. [173]

Mr. McKevitt: No.

The Court: There hasn't been any evidence so far she is incapable of driving.

Mr. McKevitt: No, I think, your Honor, if I may——

The Court: Well, I will take a look at that case during the recess. Court will recess for——

Mr. McKevitt: The particular language that I have in that regard, in answer to your Honor's

(Testimony of Ernest Everett.)

question, that I don't care how careful an operator she is, under the language of this decision, you have got to indulge a presumption that she is incompetent.

The Court: If she is too young to get a license, the presumption is she is not capable of driving. That is the presumption.

Mr. McKevitt: That isn't the way I understand it. Maybe your Honor interprets it correctly.

The Court: I misunderstand it, then, I guess.

Mr. McKevitt: The authorities uniformly hold that it is negligence per se for the owner of a motor vehicle to entrust it to a minor under the age specified by statute.

"The prohibitory enactment itself constitutes a conclusive declaration that an individual younger than the age designated is incompetent to drive a motor vehicle." [174]

If I understand that correctly, no matter how skillful she is, if she hasn't got a license, it is the presumption that she is not competent to drive.

Mr. Etter: Well, what if she is an excellent and very skilled driver and she is over the age provided by the license provision, but hasn't got a license? Now, that is what counsel is saying.

The Court: It seems to me that the only difference here in this statute between an adult and a minor is that the adult is responsible for his own conduct so it is unlawful for an adult to drive without getting a license. In the case of a minor, they put the responsibility on the parent and say

(Testimony of Ernest Everett.)

no parent shall permit the minor to drive unless they are 18 years of age, but it seems to me that this rule applies to, say, somebody 14 years of age. If a minor 14 years of age drove, then the presumption would be that they were not capable of driving.

Of course, if your position is correct here, we have not further need of a jury, because——

Mr. Etter: That's right.

The Court: Because the Court should direct a verdict if it is negligence per se. There is nothing for the jury to decide.

Mr. McKevitt: I know it is a very vital legal question, your Honor. [175]

The Court: I will take a look at that case during the recess. Court will recess for ten minutes.

(Whereupon, a short recess was taken.)

The Court: I have taken rather a hurried look at this case of *Atkins vs. Churchill* that Mr. McKevitt cited and appears in 30 *Washington* (2d), 859. The fact statement is rather long and involved and a little difficult to follow, but here there was the issue presented to the jury that the appellant, who was the defendant below, had entrusted his automobile to two immature minors, his daughter Hattie and Jerry Rubenstein, although they were not either of them the driver of the car at the time of the collision. At the bottom of Page 865, it appears that:

“It is admitted that appellant entrusted his automobile to his immature daughter and to Jerry Rubenstein, both of whom were under the age desig-

(Testimony of Ernest Everett.)

nated by law as eligible to operate a motor vehicle.”

Now, referring back to the top of Page 864, we find what that age was:

“His daughter Hattie, a student of Centralia High School, invited Wayne Tamblyn as a guest.”

This was a mixed-up affair where the young people were running all around to various functions.

“Two other high school girls, Donna Madsen and Rachel Thompson, friends of Miss Churchill, invited Roger Zorn and Jerry Rubenstein as their guests. None of these six persons,”

That is, the daughter Hattie and even Rubenstein, as mentioned down here, the ones he entrusted his automobile to,

“None of these six persons was more than 15 years of age, and none had an automobile operator’s license or was qualified, under the statute, which provides that a vehicle operator’s license shall not issue to any person under the age of 16 years.”

Then it cites Remington Supplement 1947, Section 6312-45.

Now, the part that Mr. McKevitt read, the general rule is stated that:

“The owner of a motor vehicle who entrusts the vehicle in the hands of an unfit person, thereby enabling the latter to drive it, may be held liable for an injury negligently inflicted by the use of the vehicle by its driver as a proximate result of incompetency or unfitness of the driver, although the use [177] being made of the vehicle at the time of

(Testimony of Ernest Everett.)

injury was beyond the scope of the owner's consent. The authorities uniformly hold that it is negligence per se for the owner of a motor vehicle to entrust it to a minor under the age specified by statute."

Now, I take that to be under the age specified by statute, under the age of 16, and not under the age of 18 years. The 18 years simply provides that no parent shall permit a minor under 18 to drive a car unless they have a license. I think that is apparent from the next sentence:

"The prohibitory enactment itself constitutes a conclusive declaration that the individual younger than the age designated is incompetent to drive a motor vehicle."

Now, how could the law conclusively declare a person under 18 is incompetent to drive a motor vehicle if their parent chooses to turn around and give them a license to drive one? There is no conclusive declaration that a person 17 years of age, certainly, is incapable of driving a motor vehicle. If that were the policy of the law, there wouldn't be any license issued to them. So that I think this applies only to those cases where the minor is of the age where they are not eligible under any circumstances [178] to procure a driver's license, and I think under the rule relied upon here, that it is immaterial whether or not this girl had a license. The only way that defense could be established, I think, is to show she was incompetent to drive an automobile, and there hasn't been evidence of that so far, certainly.

(Testimony of Ernest Everett.)

The record may show an exception to my ruling, if you think it would be helpful to have one, Mr. McKevitt.

Mr. McKevitt: With your Honor's permission, in the absence of the jury, I would like to make a short offer of proof on that.

The Court: Yes, all right.

Mr. McKevitt: The defendant Northern Pacific Railway now offers to prove by cross-examination of the plaintiff in this action that at the time of the death of Erna Mae, she did not have, possess, or own, nor was there issued to her, a license by the State of Washington to operate a motor vehicle upon the highways of this state.

Mr. Etter: I think it should further be shown that at the time of offer of proof is made, that the girl was 16 years and 11 months old.

Mr. McKevitt: Well, that is in the record already.

The Court: Yes, that will be in the record. I suppose an objection is made?

Mr. Etter: Yes, your Honor. [179]

The Court: It will be sustained.

All right, you may bring in the jury.

Mr. Etter: Your Honor will advise the jury on the ruling?

The Court: Yes.

(Whereupon, the following proceedings were had in the presence of the jury.)

The Court: All right, gentlemen of the jury, I explained to you at the outset that the Court has

(Testimony of Ernest Everett.)

sole responsibility for deciding these questions of law, and the Court has decided, as a matter of law, that the objection should be sustained to the last question as to whether the deceased girl had a motor vehicle operator's license. You should disregard the question and not speculate as to what the answer might have been.

Proceed. Mr. Everett, you are still on the stand, you are under cross-examination.

Mr. McKevitt: No further cross-examination.

The Court: All right, redirect?

Mr. Etter: Just a question or two.

Redirect Examination

Q. (By Mr. Etter): Mr. Everett, had you any time prior to the accident had [180] any difficulty with the carburetion?

A. Well, in starting the car at times in the morning, it was cold, you see, and I had a little trouble in starting and I had adjusted the carburetor.

Q. You say you had adjusted the carburetor?

A. Yes, and prior to this and several days before, and I drove to town on a Friday before the accident and got groceries and stuff.

Q. You say that some days before this happened, you had made an adjustment, is that right?

A. Yes.

Q. And then that you drove to Ellensburg on the Friday before the accident happened?

A. On Friday, yes.

(Testimony of Ernest Everett.)

Q. Did you discuss this with Mr. Klocke, do you recall, about your carburetion trouble?

A. Oh, yes.

Q. You had discussed it with him?

A. I had told him that I had trouble, you know, in starting the car in the mornings when it was cold and I had adjusted the carburetor in the meantime.

Q. I see. Did you say that it had been plugging or something to that effect? I gather that that was what counsel was asking. Did you tell him anything like that that you recall? [181]

A. Well, the carburetor trouble, I don't just remember the words I said.

Q. All right.

Mr. Etter: I think that is all.

Recross Examination

Q. (By Mr. McKevitt): When did you have, and where, this conversation with Mr. Klocke about carburetor difficulties in starting when it was cold? Where did you have that conversation and when? Was it up at the crossing?

A. Well, I couldn't just remember when it was.

Q. Well, was it——

A. That we were talking about the car, whether it was afterwards. It might have been afterwards, I couldn't recollect just when it was.

Q. Well, was it after the accident?

A. It may have been, I think it was.

Q. How long, Mr. Everett?

(Testimony of Ernest Everett.)

A. Well, I couldn't say.

Q. And where did the conversation take place?

A. Well, I couldn't say that, either, now, whether it was at his place or up there or he brought me home. It might have been on the road home.

Q. From the crossing? [182]

A. I couldn't say exactly when it was.

Q. Well, was it that same day?

A. Well, I couldn't say that, either, for sure.

Q. Well, do you have any recollection when you had this conversation with him, having in mind the date of the accident?

A. Well, I have been up there and he had been down there several times after the accident and we talked about it.

Q. Well, is it your testimony that you don't know whether that conversation took place on the day of the accident or not?

A. I don't recollect right now just when it did take place.

Q. Have no idea in that regard, haven't you any recollection at all?

A. We were talking and everything, we was upset so bad, you know, that I don't remember just when it was that it happened.

Mr. McKevitt: That is all.

Mr. Etter: That is all.

(Witness excused.)

Mr. McKevitt: Your Honor, may I confer with

Mr. Etter with reference to one witness that we both subpoenaed?

The Court: Yes. [183]

(Off-the-record discussion between counsel out of the hearing of the reporter.)

Mr. Etter: Call Mr. Klocke, your Honor.

The Court: All right.

LEE KLOCKE,

called and sworn as a witness on behalf of the plaintiff, was examined and testified as follows:

Direct Examination

Q. (By Mr. Etter): Will you state your name, please? A. Lee Klocke.

Q. Lee Klocke. And where do you reside, Mr. Klocke? A. Ellensburg, Washington.

Q. And will you tell us, you are there with your family, are you, sir? A. Yes, sir.

Q. And what people comprise your family?

A. I have two daughters.

Q. You have two daughters. And you say that you live near Ellensburg? A. Yes.

Q. Where do you live in relation to the residence of Mr. and Mrs. Everett?

A. Well, I live about 80 rods north of the Everett home. [184]

Q. Of the Everett home? A. Uh-huh.

Q. Is that on the same highway or the same county road to which a considerable reference has

(Testimony of Lee Klocke.)

been made as going past your house and extending up in the direction of the Everett home?

A. It is.

Q. It is. And did you say how long you have lived there, Mr. Klocke?

A. It was 20 years this spring.

Q. At the same residence?

A. That's right.

Q. And you are acquainted, are you, with Mr. and Mrs. Everett? A. I am.

Q. And have been neighbors with them since they moved there from Kalispell, Montana, in 1952?

A. That's right.

Q. Mr. Klocke, have you had an opportunity since you have been in the courtroom to look at the diagram or the chart which has been prepared and designated here as Defendant's Exhibit No. 1?

A. I have looked at it.

Q. You have looked at it. Does that fairly represent the general area surrounding the place where the accident [185] occurred with respect to the county highway, the Milwaukee overpass, the Northern Pacific main line, and public highway and other points of designation, such as the O'Neill place, that are included within the diagram?

A. Well, looking at it, from my standpoint it is a little out of proportion. It doesn't look quite like I have it pictured in my mind, although it may be right.

Q. All right, in what respects do you feel that it is possibly out of proportion, Mr. Klocke?

(Testimony of Lee Klocke.)

A. Well, the road going south——

Q. Beg your pardon?

A. The road going south toward our home is straight south on the section line.

Q. You are referring to this (indicating on Exhibit 1)? A. That road there.

Q. It is straight south on the section line?

A. Straight south on the section line.

Q. All right.

A. And the road going east is also on the section line and it is straight east, so that would be pretty much——

Q. Which part of that road do you refer to now, the one going east on the section line?

A. The one that goes past the O'Neill house.

Q. This section here (indicating)? [186]

A. That is on the section line.

Q. That is on the section line?

A. That's right.

The Court: Pardon me, this might be helpful and might not be, but isn't that road going south represented on that map as being due south. Your direction indicator up there is that little mark. The railroad isn't strictly east and west. That is north and south, isn't it?

Mr. McKevitt: That's right.

The Court: So your road down there is substantially represented as going south, is that correct?

Mr. McKevitt: This road, your Honor (indicating)?

The Court: Yes, that one?

(Testimony of Lee Klocke.)

Mr. McKevitt: Yes, that is south.

The Court: I thought I would just call that point out, that it might be helpful.

Mr. McKevitt: Compass direction, that is south.

Mr. Etter: The directional marker appears that, yes.

Q. See that yellow pencil, I mean for directional purposes, we have marked these north, south, east and west, to comply with railroad parlance ordinarily, Mr. Klocke.

The Court: I think what might be confusing, ordinarily, the conventional map, up is north and down is south, [187] as we all remember, that isn't quite on that oriented that way.

Q. (By Mr. Etter): This is your general direction as indicated by the directional marker and, likewise, it is after the curve on the road (indicating). So that taking that as a directional marker and this as being substantially south, does that comply? A. That is about right.

Q. If we were to move these around, rather north here and south and east and west in that direction, turn it a little bit, is that right?

A. I see it all right now.

Q. All right, any other respect—

The Court: Pardon me, I don't want to inject too much into this. Is your testimony, Mr. Klocke, that after the road turns, it would be running not parallel to the railroad track, but rather up toward it in a strictly easterly direction after the road turns there and goes east? A. It runs—

(Testimony of Lee Klocke.)

The Court: It runs true east on the section line?

A. It runs—that is, for the first quarter of a mile it does.

The Court: I see.

A. And then it does make a jog. [188]

The Court: Then it would turn toward the railroad track and not be parallel with it there, if that is your testimony, is that correct? I don't want to confuse the witness, but I just want to find out what he is testifying.

A. You mean the road going east?

Mr. Etter: Would you come up to the map and tell us, if you will?

The Court: You get my point, do you not, Mr. McKevitt? I am just trying to find out what he is testifying.

Mr. McKevitt: Yes.

Mr. Etter: Yes.

Q. Extending this county road, I think the Court was inquiring whether or not after it turned here (indicating), did it parallel the railroad line? Does it parallel it?

A. This road here runs east and your railroad runs at the angle it is running, which would be southwest—southeast, rather, towards Ellensburg, and this runs more away from the railroad, but this road here would be—there is a slight curve in this road as we cross the N.P. here (indicating). But down here it would be perfectly square with

(Testimony of Lee Klocke.)

this, that they are both on the section line and the sections are square.

Q. I see. [189]

A. In other words, it would be a square corner.

Q. Wouldn't that, running along the section line after it made the turn, then, would it run on the direction as appears here, almost parallel with the railroad line?

Mr. McKevitt: What do you mean, that road?

A. Running straight. This runs straight south; the railroad runs southeast.

Q. (By Mr. Etter): Southeast, I see. So the railroad would be running southeast and this road would not? A. Straight south.

Q. Straight south.

A. It also moves. This is a trestle from here to here (indicating), and this road goes underneath the same trestle that the N.P. does.

Q. Under the same trestle?

A. Under the same trestle, which from this point to this point looks out of proportion to me, but maybe it isn't. In other words, the picture to my mind would be more this way (indicating).

Mr. McKevitt: Well, of course, Mr. Etter, I want to be clear on this for the record. No matter what the witness' independent view may be, I thought we were agreed when we furnished you that map, that that was an accurate map and made under actual survey. I don't know what the purpose is in going into it. Couldn't be anything except to [190] attack the accuracy of this map.

(Testimony of Lee Klocke.)

Mr. Etter: Well, now, Mr. McKevitt, I am not doing that at all, I certainly admit that your map is accurate on its face and under the degree, but I likewise don't think, do you, that the map is perfect as a visual guide or a visual aid to a jury? That is all I am trying to do is to give the jury a perfect picture, aside from a cold chart. I am not objecting to your chart at all.

Mr. McKevitt: Well, then——

The Court: Of course, you have this situation, too, do you not, that a part of the road there leading to the plaintiff's residence is not shown on the map?

Mr. Etter: Not shown at all.

Mr. McKevitt: It is below the map.

The Court: Yes, below the map.

Do you wish Mr. Klocke to stay down there?

Mr. Etter: No.

The Court: You may proceed with the examination.

Mr. Etter: You can step back up there, Mr. Klocke.

Q. Now, do you recall March the 8th what occurred particularly on that day as a result of this accident that occurred, Mr. Klocke?

A. Well, pretty well.

Q. All right, do you recall the train, that is, the Northern Pacific passenger train, on that date as it came out of Ellensburg? [191]

A. I saw the train.

Q. You saw the train?

(Testimony of Lee Klocke.)

A. I did see the train.

Q. Where were you at that time that you saw the train?

A. I happened to be welding in front of my shop.

Q. In the front of your shop?

A. I was welding on some material there and I just happened to raise the hood and did see the train go by.

Q. Do you recall where it was that you saw the train?

A. Well, it was—it would be straight east from where I was.

Q. Straight east from where you were?

A. That's right.

Q. And in that respect, assuming it to be straight east from where you were, are you able to give me any idea, directionally speaking, as to where the whistle post which is shown here, Mr. Klocke, this whistle post is shown up here (indicating), could you tell us where that would be, directionally speaking, from your house, which is down in here some place, I assume?

A. It would be straight east and about, maybe, 200 or 100 feet north.

Q. And 100 feet north? A. Yes. [192]

Q. Of your place? A. That's right.

Q. Okay. And can you tell us whether it was there or where was it with reference to the whistle post that you observed the train on that day?

A. Well, I just noticed the train go by.

(Testimony of Lee Klocke.)

Q. You noticed it go by? A. Go by.

Q. Did you see the train go under the overpass?

A. No, I can't see that from my place.

Q. You cannot see it from your place?

A. After it gets to the whistle post, I cannot see it.

Q. After it gets to the whistle post?

A. That's right.

Q. I see. I assume that when it passed the whistle post, that was as much as you saw of it, you saw it no more? A. That's right.

Q. All right, was there anything else that attracted your attention other than the fact you saw the train go past?

A. I saw the girl drive by, or the car, I thought it was the girl.

Q. I see. With reference to the train going by, when did you see her? Which was first?

A. That I can't say. [193]

Q. Oh, I see.

A. I don't remember, I just noticed both of them go by as I quit work, but it was no doubt pretty close together.

Q. No doubt——

A. No doubt pretty near the same time, but I don't remember just which one I saw first. I don't remember that at all.

Q. What you are saying is, your recollection is that you saw the car go past and you also saw the train, but you don't know what time?

A. No, I don't remember just how I saw them,

(Testimony of Lee Klocke.)

but I did see both of them. I waved at the girl as she went by. I am right close to the road.

Q. I see. All right, can you tell us about how far your place is from the crossing?

A. It is just 80 rods to my gate.

Q. 80 rods? A. To the gate.

Q. To your gate. Your property extends along the road toward the property of Mr. Everett, does it not? A. Yes, it does.

Q. Directionally along there. At that time, what was the situation with regard to the trees and shrubbery running along that fence line of yours facing the county highway? [194]

A. From my house to the county highway?

Q. No, along the county highway, the length of your property facing the county highway and up toward the Everett residence, what was the condition along there?

A. Well, right at my place there was some trees there, but after you get away from my place there isn't any trees.

Q. I see. And just beyond toward the crossing, is there considerable shrubbery along the side of the highway? A. There was brush.

Q. Brush between you and the crossing?

A. That's right.

Q. I see. Now, are you acquainted Mr. Klocke, with the crossing which is designated on the chart to which I am pointing? A. Yes, I am.

Q. Beg your pardon?

A. I am acquainted with it.

(Testimony of Lee Klocke.)

Q. You are acquainted with the crossing. Have you used it a number of times?

A. For 20 years.

Q. You have. All right, now, will you tell us, had you used the crossing a short time, or when did you last use the crossing, if you remember, prior to the accident which occurred on the 8th of March? [195]

A. Well, I couldn't say exactly, but I use it nearly every day. I might have used it that same morning, I don't remember.

Q. You don't remember. But you used it regularly, did you, up until the time of the accident?

A. Yes.

Q. I see.

The Court: By the way, his place is 80 rods from the crossing. I wonder if we could have that in miles or in feet. Is that a quarter of a mile?

A. That is a quarter of a mile.

Mr. McKevitt: 1,320 feet.

The Court: That is a quarter of a mile. All right, go ahead.

Q. (By Mr. Etter): Now, you have used this crossing, as I gather, and had used it a number of times prior to the accident up until the date of the accident. Will you describe the crossing to the jury, Mr. Klocke, the approach to it and the crossing itself, just prior to this accident?

A. Well, there is an incline, you go upgrade across the track.

(Testimony of Lee Klocke.)

Q. Would you step down with the pointer and just describe that as best you can?

A. When you approach the crossing there, there is an [196] incline, you go upgrade, and this crossing, the minute you leave that crossing, you are in a turn to go south on this road (indicating). If you do go south, there is three ways to go, you can go straight ahead or follow the track. But as we leave this crossing, we turn immediately after you cross this crossing. It is right at the point——

Mr. McKevitt: What is at the corner? What did he say was at the corner?

A. This is a corner right here; in other words, it is a rounding corner where we cross this track, we turn and go south on this here, and there is a grade that you go up to get over this track.

Q. (By Mr. Etter): Now, what I would like to have you do, you have got us coming back in reverse, but I would like to have you tell us about the situation when you go up in the northerly direction and on over on the public highway from your side of the railroad track.

A. We approach this crossing right at the corner and cross it. That is about all there is to it, you just go up a grade and over the crossing.

Q. What kind of a grade is that, Mr. Klocke, would you say, as to how high it is above the road? Would you say it was a sharp grade, at least so far as driving it is concerned? [197]

Mr. McKevitt: I object to the form of that question, the "sharp."

(Testimony of Lee Klocke.)

Q. (By Mr. Etter): What type of a grade is it for a man driving an automobile?

Mr. McKevitt: Object to that question. We have already got in evidence the mathematics on the situation.

The Court: Well, I think he may describe it in his own words.

Do you understand the question, Mr. Klocke? He asked what kind of a grade it is.

A. Well, I would say it is just an incline to go over the top of that track. Just how high it would be, I don't know exactly, but you do have to go up an incline to go over the track.

Q. (By Mr. Etter): All right, and is there a curve as you cross over the track to stay on the highway? I mean, what type of a curve is that?

A. This right here (indicating)?

Q. Yes.

A. Well, in order to come this way, it is rather sharp, you come right back down. In other words, this road, if it run straight south and this is straight east (indicating), this would be almost——

Q. Would be a 45 or 90 degree curve?

A. I don't know just what you would call it. It might be a straight "L." [198]

Q. All right, in driving, when you have driven it, how do you proceed? Do you proceed in high, that is, when you are going over it, or do you change gears?

A. Yes, we usually shift gears, it is a pretty sharp corner, and it really is a little rough on

(Testimony of Lee Klocke.)

account of making this corner. The plank that lays in front of the rails, a lot of times, is pretty bare on account of you make a corner and your wheels kick the gravel out all the time.

Q. I see.

A. That is, by turning, you throw this gravel out, but like the other side probably wouldn't do that, because you drive more straight on to it, but you turn immediately would cause the gravel to go out.

Q. I see. All right, now, when you are driving, when you have driven, say, immediately prior to the accident, Mr. Klocke, immediately prior to this accident, you have driven on it, can you tell us about the visibility that you have to see up the track in an easterly direction, as the map indicates, towards Ellensburg, as to oncoming trains? What is the situation there?

Mr. McKevitt: Well——

A. Actually see back——

Mr. McKevitt: What point are you referring to now? How far from the crossing? [199]

Mr. Etter: Well, I want him to tell starting where it appears, oh, within 25 or 35 or 40 feet.

Q. Just pick a point out on that map, if you wish.

A. Well, if you were back—I have never measured it, don't know exactly, but if you were back, I would say, 30 feet, you would be looking pretty much down the track this way (indicating). It

(Testimony of Lee Klocke.)

would be very easy to see a train coming from the north or——

Q. From Seattle?

A. Yes, this way. This way would be a little harder to see because you have to get pretty close to the track to look back this way (indicating).

Q. And why is that? What reasons are there for that?

A. Well, because you are coming in on a curve and your car, in order to be facing east, would have to almost make the turn and you are right on the turn right here (indicating).

Q. I see. And when you have driven your car up there, can you tell us what point you have reached in distance from the crossing before you are able to see up through the underpass or the overpass, if you can?

A. Well, I wouldn't say just exactly where it would be to look back, because I never did measure that, but I know we do get awful close to the track to look back to get a clear vision. [200]

Q. To get a clear vision? A. That's right.

Q. Do you know what the condition of the planking—you can take the witness chair.

(Witness resumes stand.)

On the day of the accident, did you have occasion to examine or to observe the planking of the crossing or the condition of the crossing, speaking of it now as the southerly approach; in other words, the approach that you have if you were driving from your place over to the public highway? Did

(Testimony of Lee Klocke.)

you have a chance to examine that planking that day?

A. Well, I never looked at it particularly, but I didn't notice that it was much different than it usually is. There is times it was worse and I think there was times it was better.

Q. I see. I will hand you the Defendant's Exhibit 30, which is indicated by the tag as Nos. 1, 2, 3 and 4, panorama, camera 25 feet south of the crossing facing east and north, showing view of driver approaching crossing. It was taken a couple of days, I believe, wasn't it, Mr. McKevitt—

Mr. McKevitt: March 10th, two days after.

Mr. Etter: After the accident. [201]

Q. Now, handing you this exhibit, I want you to examine, or can you see the condition there of the grade crossing and the planking?

A. Well, I have seen it look like that and I have seen it look better and I have seen it look, you might say, worse.

Q. I see. But would you say whether or not that is the condition that you noted or about that condition on the day that this accident occurred on the approach on this planking?

A. Pretty much so, about like that, I would say.

Q. I see. Did you have any occasion to take any measurements of how far down the approach was from the grade crossing?

A. No, I never.

Q. You did not? A. No.

(Testimony of Lee Klocke.)

Q. I see. Did you state that you had seen this crossing in that condition before that, too?

A. Yes, I think I have.

Q. Have you seen it in any condition worse than is indicated on the exhibit?

Mr. McKevitt: Well, I object. You mean you are referring now to the day of the accident?

Q. (By Mr. Etter): Well, have you seen it when the [202] approach to the plank was further down below the actual rail crossing than it appears on the exhibit?

Mr. McKevitt: I object to that question as leading and suggestive.

The Court: Well, I think not, it is whether he had seen it that way or not. Have you?

A. Well, I don't know, when a picture that way, I have seen it pretty rough and then I have seen it when it was fresh fixed up, why, it was pretty smooth. But as we said before, it is in a turn and they could fix it, but it didn't last because you turn and you kick it right out again with your car.

Q. (By Mr. Etter): I see. Now, did you notice the condition of the crossing, oh, some 10 or 12 days later or thereabouts, Mr. Klocke, whether there was any difference?

Mr. McKevitt: That is objected to, if your Honor pleases, what the condition 10 days after this was, as being incompetent, irrelevant and immaterial.

Mr. Etter: I think we have a right to show——

(Testimony of Lee Klocke.)

Mr. McKevitt: I object to counsel stating his position before the jury.

The Court: Will counsel approach the bench, please?

(Whereupon, the following proceedings were had [203] in the presence, but out of the hearing, of the jury:)

The Court: I think we have this come up in almost every one of these cases. What you are proposing to show now is that they changed and fixed it afterwards?

Mr. Etter: That's right, and cut down the brush.

Mr. McKevitt: That is no evidence of negligence.

Mr. Etter: That is evidence they could have made it safer, that's all it is, under the general rule.

Mr. McKevitt: We could have made it foolproof, but the law doesn't require us to do so.

The Court: As I recall, it isn't taken as evidence of negligence, but it has been admitted as showing a safer condition could have been maintained.

Mr. Etter: Could have been maintained, that's correct.

Mr. McKevitt: Well, I am objecting, if your Honor please.

The Court: Well, all right.

Mr. McKevitt: As being incompetent, irrelevant and immaterial.

(Testimony of Lee Klocke.)

(Whereupon, the following proceedings were had in the presence and hearing of the jury:)

Q. (By Mr. Etter): The question again, Mr. Klocke, did you [204] have a chance a few days after, within a week or 10 days, to observe this same crossing?

Mr. Etter: Going to make your objection?

Mr. McKevitt: Well, it is understood I have an objection, a general objection, to this testimony?

The Court: You wish your objection to go to all this line of testimony without repeating it?

Mr. McKevitt: On the condition of the crossing on any period subsequent to the date of the accident.

The Court: All right, the record may show that. You may answer.

Mr. Etter: You may answer.

A. Well, I never paid much attention to the crossing after that. I never paid any attention to whether it had been fixed up better than it was or hadn't. I never really paid much attention to it.

Q. Well, didn't you advise me, Mr. Klocke, that you found——

Mr. McKevitt: Just a moment, I object to this cross-examination of his witness, I can see it coming. If he wants to claim surprise, that is one thing.

Q. (By Mr. Etter): I will ask you this, Mr. Klocke: Was there any different condition as to the brush that was along the right of way at the

(Testimony of Lee Klocke.)

crossing within a week or 10 days after this accident occurred? [205]

Mr. McKevitt: Same objection, now, as to any condition of brush within 10 days or any period after the date of the accident.

The Court: Very well, the record may show that. He may answer.

A. Well, I never paid much attention to it, I wouldn't answer whether there was something done. I think there was some work done, but I don't know just what day or how much was done. I didn't pay much attention to that.

Q. (By Mr. Etter): That is true, I'm not asking you that, but I'm asking if there was a difference between the brush that was along the railroad right of way up close to the crossing, if there was some difference in that within a week or so after this accident occurred?

Mr. McKevitt: Same objection, if your Honor pleases.

The Court: Overruled.

A. Well, I don't remember whether there was or not.

Mr. Etter: I think that is all, Mr. Klocke. [206]

Cross Examination

Q. (By Mr. McKevitt): Mr. Klocke, the Northern Pacific served a subpoena on you, or caused one to be served, sometime last week to come up here as a witness; is that not correct?

A. That's right.

(Testimony of Lee Klocke.)

Q. Now, taking first the condition of the crossing and referring to the planking on the outside of the rail towards your home, I will show you two photographs and you will bear in mind that it is agreed between counsel attorneys for either side, that these pictures were taken two days after the accident happened, and that one view shows with the camera up close to the crossing and facing east and the other one facing west.

A. This would be west?

Q. This one the camera is east of the crossing, that's right, and that is facing west, and this is west of the crossing and facing east.

Now, will you examine those photographs, please?

The Court: Will you give the numbers for the record?

Mr. McKevitt: Oh, I'm sorry, your Honor. Exhibits 17 and 18.

The Court: All right.

Mr. McKevitt: Defendant's.

A. All I can say, it is the crossing, all right.

Q. Are those photographs a fair representation of the condition of the crossing as it existed——

A. It is a picture——

Q. ——on the day of the accident? Are they fair representations?

A. The pictures are taken in the wrong angle for me to judge, which is on both sides. They were taken from the end; we approach from the side, and I can't see.

Q. Well, take a look at the planking on the out-

(Testimony of Lee Klocke.)

side of the rails in both pictures. That is what we are principally concerned with.

A. I would say that looks like it, all right.

Q. Fair representation as it existed on the day of the accident?

A. I would say so, pretty fair.

Q. By the way, I have discussed this case with you at some length in my office last night?

A. That's right.

Q. And I have a map which is a duplicate of that up there, have I not? A. That's right.

Q. And I call your attention now to Defendant's Exhibit No. 31. I showed you those photographs yesterday, did I not?

A. I don't believe I saw this one. [208]

Q. Oh, you don't believe you have seen this one?

A. I don't believe I did.

Q. Well, it is also agreed that Exhibit 31, which is the one you are looking at, is a panoramic view comprised of 1, 2, 3, 4 photographs, and when those four photographs were each taken, the camera was 180 feet south of the crossing, facing east and north. South of the crossing would be toward your home.

A. Uh-huh.

Q. And facing east and north toward the Milwaukee viaduct. Now, will you examine 31?

A. That looks very much like it looks there, very much so.

Q. And that photograph is a fair representation of the conditions that existed on March 8th.

A. I would say it is.

(Testimony of Lee Klocke.)

Q. All right. Now, make an examination of Defendant's Exhibit 30, which is a panorama comprised of four photographs, and in those photographs the camera is 25 feet south of the rail and facing east and north, as in this picture, only the difference is where the camera is located.

Examine that picture and advise the Court and jury whether or not it is a fair representation of the physical conditions that existed in and around that crossing on the 8th of March, 1952. [209]

A. I would say that looks pretty much like it.

Mr. McKevitt: May I make this observation to the Court with reference to this witness?

I have explained to Mr. Etter, he told me last night that he is very anxious to get out on our train this evening because his wife is going to undergo an operation tomorrow, and I told him if he wasn't used by Mr. Etter, that I would ask permission to put him on out of turn.

What I would like to do now is complete a brief cross-examination and make him my witness for just two or three questions.

The Court: You may do that.

Mr. McKevitt: And I had in mind we might run over two or three minutes.

The Court: Yes, all right.

Mr. McKevitt: Thank you.

Q. Mr. Klocke, you said you are about 80 rods, your home, from the crossing?

A. That's right.

(Testimony of Lee Klocke.)

Q. You are about the same distance from the crossing, approximately, as the whistle post is?

A. I am exactly, I am on the corner.

Q. Yes. And you were working out in your yard welding? A. That's right.

Q. Using a welding machine? [210]

A. That's right.

Q. Did you have something over your head for protection?

A. I had a welder's hood on.

Q. And covers your ears?

A. Well, not exactly cover your ears, but you don't hear much with a welder's hood on when you are welding.

Q. The welding machine was making quite a racket, is that right? A. That's right.

Q. But you saw Erna Mae go by your house and you waved at her?

A. I saw the car and I thought it was her and I waved at her.

Q. Yes. Did you see the car, that car you are referring to, before you saw the train or afterwards? A. That I can't say.

Q. You can't recall? A. Exactly.

Q. Well, was there a short interval of time or a long interval of time, or what, if you can tell, was the interval of time between seeing both vehicles, no matter which one you saw first?

A. I can't exactly say just exactly what one I saw first or just how long it was between, but I

(Testimony of Lee Klocke.)

happened to be looking up at the time, I did see the train and I saw the car. [211]

Q. Well, can you tell us how long after you saw Erna go by that you received information that caused you to go on up to the crossing? How long was that after she had passed by your place?

A. Well, it would be a short time, but just exactly how long, I don't remember.

Q. Having in mind the distance, a short time?

A. Yes.

Q. Did you estimate the speed of her car as she went by your home?

A. I never paid much attention. She never drives very fast or never had to.

Q. Well, what I am inquiring about, have you any independent recollection now of approximately the speed? If you haven't, why, say so.

A. I don't know how fast she was going.

Q. All right. You were advised by someone, what caused you to go up to the crossing? Was it information that you received from somebody, without telling what it was, or was it your own actual knowledge that something had happened? Which was it?

A. Someone called the house and my wife came out and told me that——

Q. I see. A. ——someone was killed.

Q. Then you jumped in your car and went up?

A. That's right.

Q. You had in mind at that time, then, that

(Testimony of Lee Klocke.)

possibly that was the car, the truck, Erna was driving that was involved? A. I think I did.

Q. Yes. When you got up there, after you arrived there, there was a gathering of quite a few people, wasn't there? A. That's right.

Q. Was Sheriff Dorsey there? Do you know Sheriff Dorsey?

A. I can't really remember who was there. I was interested in seeing what happened and I didn't pay much attention to anyone.

Q. Do you recall whether or not you saw a state highway patrolman?

A. I'm pretty sure I did.

Mr. McKevitt: Now, if the Court please, I will make him my own witness, if your Honor permits.

The Court: Well, let's see, do you have any redirect examination, Mr. Etter?

Mr. Etter: No, I haven't, but I have about three questions I would like to ask him on direct. I neglected to ask him, I couldn't find my notes on it.

The Court: Yes, all right.

Mr. McKevitt: On redirect?

Mr. Etter: On direct.

The Court: You want to reopen on direct.

Mr. McKevitt: Oh, I see, you want to reopen on direct. All right. Do you want me to finish with him, Max, now, then you can take him?

Mr. Etter: Certainly.

Mr. McKevitt: Very well.

(Testimony of Lee Klocke.)

Direct Examination

Q. (By Mr. McKevitt): I am making you my own witness for the purpose of these questions.

I will ask you whether or not you had a conversation with Mr. Everett at that crossing while you were both up there following the accident with reference to the truck? Did you have a conversation? You can answer that yes or no.

A. I can't remember whether we did or not.

Q. You have no recollection of any conversation at the crossing or near the crossing shortly after the accident?

A. Concerning the truck, I don't.

Q. Concerning the truck. Well, did you have any [214] conversation with Mr. Everett following the accident about an idling jet? A. We did.

Q. Where was that?

A. I can't say the exact spot we were in.

Q. Well, was it up at the crossing?

A. That I can't say.

Q. Well, was it immediately following the accident?

A. I think it was sometime right after the accident.

Q. And the same day?

A. Well, I think it was the same day. I don't know exactly whether it was the same day or not.

Q. Well, I will ask you, you gave a statement to one of the members of the Northern Pacific Claim Department two days after this accident, didn't you? A. I didn't hear you?

(Testimony of Lee Klocke.)

Q. You gave a written and signed statement to one of the members of the Claim Department two days after the accident, did you not?

A. Yes, I did.

Mr. McKevitt: I think for the purpose of this question, if the Court please, I will have to claim surprise, your Honor.

Mr. Etter: I don't think he can claim surprise yet. He hasn't asked him what his conversation was. [215]

The Court: He seems to have surprised everybody. I think you can use the statement to refresh his memory.

Mr. McKevitt: Yes.

Q. Examine that. As a matter of fact, I have shown you that statement before and you have read it, have you not? A. Yes, I think I have.

Q. Since you came up here to the trial?

A. That's right.

Q. And the sentence there in pen and ink is in your own handwriting, isn't it? A. It is.

Q. And that is your signature?

A. I think that is pretty much——

The Court: The only question before you, Mr. Klocke, is whether that is your signature.

A. That is.

Q. (By Mr. McKevitt): Now, I call your attention to this language, and it is bottomed on a claim of surprise, if your Honor pleases.

Mr. Etter: I would like to see it.

The Court: Yes, all right.

(Testimony of Lee Klocke.)

Q. (By Mr. McKevitt): Isn't it a fact, Mr. Klocke, that you informed the Claim Agent in this statement, informed me personally, that immediately following this [216] accident, in a conversation with Mr. Everett, that Everett advised you, referring to the truck, that he said the idling jet was plugged and at a slow speed, the truck would stall? Didn't Mr. Everett tell you that immediately after the accident?

A. I think that it was sometime after the accident, but not quite worded that way, I don't believe. I didn't probably say it just quite like you have it written there, but it meant probably the same thing. He said something about that the idling jet in the truck had bothered—or had bothered or plugged or something to that effect. Now, just how he worded that, I wouldn't say exactly, but I think that that was wrote that way, but it meant——

Q. Well, in the statement in your handwriting, you wrote this: "I have read this statement and it is correct," and that was before you signed it, wasn't it?

A. That's right, I looked it over and it was pretty much what we talked about.

Mr. McKevitt: I would like to have this marked and offer it in evidence as part of the claim of surprise.

The Clerk: Defendant's 32 for identification.

Q. (By Mr. McKevitt): By the way, you were not subpoenaed by the plaintiff until last evening

(Testimony of Lee Klocke.)

after you arrived in Spokane; that is true, isn't it? [217] A. That's right.

Mr. McKevitt: Offer it in evidence, your Honor.

The Court: The Defendant's 32 will be admitted.

(Whereupon, the said statement was admitted in evidence as Defendant's Exhibit No. 32.)

Mr. McKevitt: Well, I am through now, I won't take the time to read it to the jury. We are 10 minutes over the time. I have finished unless you are——

The Court: Well, I think we should go on.

Mr. McKevitt: All right, thank you, your Honor.

The Court: Finish if we can.

Mr. McKevitt: Reading to you ladies and gentlemen, Defendant's Exhibit 32:

(Whereupon, the contents of Defendant's Exhibit No. 32 was read to the jury by Mr. McKevitt.)

The Court: I think I should say to the jury at this time that these proceedings may be somewhat puzzling to you.

When counsel is examining a witness and claims surprise, that is the witness is testifying to something or failing to testify to something contrary to what counsel has a right to expect, then he has a right to cross-examine that witness, and that is what Mr. McKevitt proceeded to do here. [218]

Now, this statement of this witness isn't under oath and it is not evidence and shouldn't be considered by you as evidence. Its only purpose is to

(Testimony of Lee Klocke.)

affect the credibility of this witness as to what he has testified. The evidence here is his sworn testimony. You shall consider that in the light of this document in order to determine what credit and weight to give to the testimony he has given, but it is material only as it pertains to matters to which he has testified here and then only for the purpose of affecting his credibility. The rest of it regarding matters concerning which he has not testified should be utterly disregarded by you.

Do you wish to take exception to that, Mr. McKevitt?

Mr. McKevitt: Pardon me?

The Court: You have a right to take exception to my remarks, if you wish.

Mr. McKevitt: I have no exception.

The Court: I see.

Mr. McKevitt: Your Honor stated the law very accurately.

The Court: All right, go ahead. Are you through?

Mr. McKevitt: Yes, your Honor.

The Court: All right, any other examination, Mr. Etter. [219]

Mr. Etter: Just a couple of questions on direct, if I may.

The Court: Yes, all right.

Direct Examination (Resumed)

Q. (By Mr. Etter): Mr. Klocke, do you recall prior to this accident that any incident ever oc-

(Testimony of Lee Klocke.)

curred to you or your car as you crossed the particular grade crossing that is involved here?

The Court: To keep from getting—pardon me—to keep from getting too much confused here, you are now re-examining him on direct as your own witness?

Mr. Etter: On direct, yes.

The Court: I see.

Mr. McKevitt: Object to that question as incompetent, irrelevant and immaterial, as to what his experience may have been in operating a car at any time, as not evidence of negligence on the part of the railway company in any particular.

The Court: Let's see, will you read the question?

(The question was read.)

The Court: Well, he may answer it. [220]

A. Oh, I can't recall of anything ever happening, although I respect that corner pretty much.

The Court: Well, that relieves the Court of the responsibility for the law.

Mr. Etter: That is all, Mr. Klocke.

The Court: Any other questions?

Mr. Etter: That is it.

The Court: Well, in view of the fact that we have——

Mr. McKevitt: As far as the Northern Pacific Railway Company is concerned, this witness may be excused. I don't know whether Mr. Etter wants him or not.

The Court: May the witness be excused?

Mr. Etter: Yes, your Honor.

(Testimony of Lee Klocke.)

The Court: All right, you may be excused, then, from further attendance here, Mr. Klocke.

(Witness excused.)

In view of the fact that we have run over 15 minutes, I think we should recess until 2, rather than 1:30.

So if you will all bear that in mind, we will recess until 2 o'clock and the jury will be excused until that hour.

(Whereupon, the trial in the instant cause was recessed until 2 o'clock p.m., this date.)

(The trial in the instant cause was resumed pursuant to the noon recess, all parties being present as before, and the following proceedings were had:)

The Court: All right, proceed.

Mr. Etter: Call Mr. Scobee for adverse examination, please.

FRANCIS WILLIAM SCOBEE,

called and sworn as an adverse witness by the plaintiff, was examined and testified as follows:

Direct Examination

Q. (By Mr. Etter): Will you tell us your name, please, your full name?

A. Francis William Scobee.

Mr. McKevitt: Keep your voice up, Mr. Scobee.

A. Francis William Scobee.

(Testimony of Francis William Scobee.)

Mr. Etter: Have to hear you way back to the end here, Mr. Scobee.

Q. And what is your occupation, Mr. Scobee?

A. Locomotive engineer on the Northern Pacific.

Q. And how long have you been an employee of the Northern Pacific Railroad. [224]

A. Employed by them since 1936.

Q. Since 1936. And what is your age now, Mr. Scobee?

A. 36. I will be 37 next month.

Q. And how long have you been an engineer for the——

A. Since 1945, June.

Q. Since 1945. What types of equipment, locomotive equipment, have you used during the time that you have been an engineer with the Northern Pacific Railroad?

A. Well, the Northern Pacific has quite a few types of locomotives, steam and Diesel. We have passenger Diesels——

Mr. McKevitt: Keep your voice up, Mr. Scobee. As Judge Driver remarked, the acoustics here are not altogether too good and you are talking a little too fast. I want to hear you.

The Witness: Okay.

Mr. McKevitt: Please.

A. Well, the Northern Pacific has quite various type of engines. They still have the steam engines in service. I have run all kinds of steam engines and the passenger Diesels and the freight Diesels.

(Testimony of Francis William Scobee.)

Q. (By Mr. Etter): The passenger Diesels and the freight Diesels? A. Yes. [225]

Q. Now, how long have you been employed or on the run, that is, the particular run that you were on on March the 8th of 1952?

A. Well, that particular run, I was an extra engineer.

Q. You were an extra?

A. The regular man had laid off.

Q. He had laid off? A. Yes, sir.

Q. Were you on the extra board as an engineer at that time? A. Yes, sir.

Q. And how long prior to that time?

A. I had been working the extra board, oh, a year or year and a half at that time.

Q. A year to a year and a half at that time. And on the extra board, did you have employment not only on that particular scheduled run, but on other runs in and around Ellensburg?

A. Yes, sir.

Q. And on this particular time, you had moved up, and the engineer on that run had laid off and you were handling that particular train?

A. That's right.

Q. How many times had you handled it through that same run? [226]

A. That particular run, I would say about 12, 15 times, on that particular run.

Q. About 12 or 15 times on that particular run?

A. Yes, sir.

(Testimony of Francis William Scobee.)

Q. That train is known as No. 5, am I correct?

A. That's right.

Q. And it is Diesel power, is it not?

A. Yes, sir.

Q. What is your braking power on that, Mr. Scobee?

Mr. McKevitt: If you know.

Q. (By Mr. Etter): What is your brake system?

A. I really don't know what the brake power is. I know how much air I carry and to that equivalent, I don't know any more.

Q. I see.

A. Because I have never tried to handle——

Q. How many cars, that is, passenger cars or baggage cars, were you pulling on that date?

A. I believe it was either seven or eight. I can't remember now just what it was.

Q. It was either seven or eight. And do you know what the length of a passenger car of that type is that you were pulling that day?

A. I believe they run about 70 feet.

Q. Is it closer to 65 or is it 70? [226]

A. To tell you the truth, I don't know.

Q. I see. But it was seven or eight cars, you believe?

A. Yes, sir.

Q. And how many Diesel units?

A. Three.

Q. Three? A. Three units.

Q. Beg pardon?

A. Three units on that particular day.

(Testimony of Francis William Scobee.)

Q. There were three units on that particular day. And what is the length of each one of those units?

A. Well, they run about 50 feet, a little better.

Mr. McKevitt: Each unit?

A. Each unit.

Q. (By Mr. Etter): 50 feet or a little better?

A. Yes.

Q. I see. What I have done here is a little calculating. If you had seven cars, 70 feet, and three units of 50 feet, that is, of your Diesel, the overall length of your train with seven cars would be approximately 640 feet?

Mr. McKevitt: If you know.

Q. (By Mr. Etter): If you know.

A. Well, I believe it runs around that, yes. I am not positive that we had that many cars. We might have had [228] one more in there.

Q. Well, if you had eight cars in there, you have another 70 feet, or possibly 710 feet, somewhere thereabouts? A. Abouts, yes.

Q. In other words, do you know whether it was possible you might have been hauling six cars, just so we can get exact on that, if we can?

A. I believe we had more than six.

Q. In all probability, as you say, it was seven or eight?

A. Yes. But there might have been one car one way or another there. I am not positive about the cars we had on that train that day, I can't memorize that far back.

(Testimony of Francis William Scobee.)

Q. Now, what system, without going into the matter of power application, what system, what brakage system, do you have on those Diesels?

A. Westinghouse.

Q. And is that air brake system an air brake system that works both with the Diesels and all of the passenger cars? A. That's right.

Q. And when you use your braking system, so far as the brakage that is applied, is it applied on the Diesel and on all of the cars in your train?

A. Could be, yes. [229]

Q. Could be? A. It depends.

Q. All right, would you explain it to me, please?

A. An explanation on that is this: When we are braking a train, well, in emergency, we'll say in emergency application of the brake valve, which we call on the railroad is "big hole," is the full amount of air goes through the engine and the train and it dynamites simultaneously the train and the engine.

Q. A "big hole," actually, is dynamiting a train, isn't it?

A. That's right. In other words, when you make a "big hole" or dynamiting the train application, you are dumping all your reservoir pressure onto your brake shoes on your engine and your train.

Q. And your train, that's correct. How much air do you carry?

A. Well, on a passenger, we carry 110 pounds air pressure on the train line.

Q. 110 pounds of air pressure on the train line?

(Testimony of Francis William Scobee.)

A. The train line, that is the air that goes through your coaches.

Q. I see. Now, do you know what the weight of those Diesel units is?

A. Well, they run around 300, oh, about 375 tons. [230]

Q. That is each unit or the three?

A. No, that is three of them together.

Q. The three units together? A. Yes.

Q. A Diesel unit is about 115 to 130 tons, isn't it, with the varying Diesels?

A. Right around there.

Mr. McKevitt: You are speaking of the three Diesel units, Mr. Etter, that were in operation that date?

Mr. Etter: Yes.

Mr. McKevitt: What you are asking the witness about?

Mr. Etter: Yes.

Q. If there is any mistake, I have reference to the three units that you were using on the date in question. A. Yes.

Q. That is, March the 8th of 1952.

A. I really don't know the actual weight, but it runs between 115 and 130 ton to the unit.

Q. 130 ton, that is, as to each one of the three units? A. Yes, that's right.

Q. Do you know or have you any idea of the weight of one of the passenger cars?

A. No, I don't.

Q. You do not? [231] A. No.

(Testimony of Francis William Scobee.)

Q. Now, on the date in question, Mr. Scobee, your originating point on your run was where?

A. Yakima.

Q. At Yakima? A. Yes, sir.

Q. And do you recall about what time it was you left Yakima?

A. About 1:40 in the afternoon.

Q. About 1:40? A. No, 1:35.

Q. And have you any idea or do you recall about when it was or what time it was that you came into the Ellensburg yard limit?

A. Well, I can't recall that time.

Q. You can't recall that?

A. No, not coming into Ellensburg.

Q. Do you recall what time you got to the Ellensburg station?

A. That was quite awhile ago, I can't recall.

Q. You don't recall that?

A. It was on time or about, and that was around 2 o'clock or maybe a little bit after.

Q. On time, which would be 2 in the afternoon or——

A. Well, I say that is about what time it was.

Q. Within a few minutes either way?

A. The time schedules have changed since then and that has been two years, that is quite awhile ago.

Mr. McKevitt: Keep your voice up, please, Mr. Scobee.

Q. (By Mr. Etter): Assuming, Mr. Scobee, 2

(Testimony of Francis William Scobee.)

o'clock was the scheduled time or thereabouts, you were on time? A. Well, I'll say yes.

Q. Approximately so?

A. Approximately on time, yes.

Mr. McKevitt: Is that coming into Ellensburg?

Mr. Etter: That is coming into Ellensburg, yes, Mr. McKevitt.

Q. Now, are you familiar with the Ellensburg railroad yard, that is, the yard limits of the yard, generally? A. Yes, sir.

Q. Would you say that is a fairly large yard?

A. Yes, it is.

Q. It is, is it not? A. Uh-huh.

Q. Do you know what the length of the yard is between yard limits?

A. In feet, no, but all I can go by is it is about half a mile, the yard limit board, we'll say.

Q. Yard limit to yard limit? [233]

A. Well, yard limit to yard limit is, oh, I don't know just what the distance is on that. I figure the yard limit board is approximately, we'll say, a half mile before entering the yard each way.

Q. Before entering the yard each way?

A. But what the distance is between the two, I couldn't tell.

Q. I see, all right.

Mr. McKevitt: His answer is one-half mile before you hit the first yard limit board?

A. Well, we'll say the yard limit board is half a mile east coming into the yard and a half a mile

(Testimony of Francis William Scobee.)

on the west end coming in from the west. By feet, I wouldn't know, I never measured that.

Q. (By Mr. Etter): Is there some distinction between the yard limit and the yard itself?

A. Well, the yard limit, that is in a working territory in a yard where anybody can do any switching, where you would have to come in prepared to look out for them yard working conditions.

Q. When you reach the yard, is that right?

A. That's right.

Q. All right. Now, when you come into Ellensburg, where did you stop your equipment with relation—I imagine you came right in to and stopped at the depot, isn't [234] that correct?

A. Usually stop at the station so the passengers can get off at the station platform right opposite the depot.

Q. Right opposite the depot? A. Yes, sir.

Q. Do you recall that you did that on that day?

A. Yes, sir.

Q. How much of a stop, of a scheduled stop, is there or was there at Ellensburg on that date?

A. Well, I would say five minutes.

Q. Beg your pardon?

A. Five minutes.

Q. Five minutes? A. Yes, sir.

Q. All right, did you do any switching on that date while you were in the Ellensburg yard?

A. No, sir.

Mr. McKevitt: What was your answer?

A. No, sir.

(Testimony of Francis William Scobee.)

Q. (By Mr. Etter): Or change any cars, add on any or take any off? A. No, sir.

Q. Your train remained the same as its makeup originating in Yakima?

A. That's right. [235]

Q. I see. And other than to come into——

Mr. McKevitt: Pardon me, Mr. Etter. You used the statement that the train originated in Yakima.

Mr. Etter: Yes.

Q. Your run originated in Yakima?

A. My run originated in Yakima.

Q. That is what I mean.

A. But the train was made up further on east.

Q. What I should say is this: Was the train's makeup the same when you arrived at Ellensburg as it was when you took over the equipment on the run of yours which originated in Yakima?

A. Yes.

Q. All right. Now, when you got to Ellensburg, as I gather it from your testimony, you discharged your passengers at the depot stop?

A. Yes, sir.

Q. And the train remained in the same condition, there was no taking of cars on or off, and you stayed there during the stop before you left to go in a generally westerly direction, at least toward Seattle? A. That's right.

Q. There was no train movement?

A. No.

Q. Until you left, is that correct? [236]

A. That's right.

(Testimony of Francis William Scobee.)

Q. All right. Now, do you recall when it was that you left Ellensburg station?

A. It was sometime after 2 o'clock, but to pin point it, I couldn't tell you. It was nearly on time.

Q. Nearly on time. Now, do you know what distance it is, approximately, Mr. Scobee, between points designated A, where you were, or, rather, where your train was at the depot for the discharge of passengers, and B, referring to the grade crossing where the accident occurred on the afternoon of March 8, 1952?

A. About four miles.

Q. It is about——

A. Around about there.

Q. It is around about four miles. And after you left Ellensburg and started in a westerly direction, what is your next stop, scheduled stop?

A. My next scheduled stop is Cle Elum.

Q. Your next scheduled stop is Cle Elum. Can you tell us what your time of departure—you say you don't recall exactly?

A. I don't recall.

Q. You don't recall exactly. Do you know, Mr. Scobee, what distance the track follows a straight pattern without noticeable curves from the time it leaves the [237] Ellensburg station?

A. Well, after you leave the Ellensburg station, you round a curve right after you leave the station, then it is a straight line in there all the way from there, all the way from the station after you round that first curve, after departure from the station.

Q. All the way from that curve?

(Testimony of Francis William Scobee.)

A. All the way for about seven miles, yes, sir.

Q. Do you know about approximately the distance that you make your curve before you hit this straight stretch of seven miles going west from Ellensburg?

Q. It is pretty near immediately after you leave the Ellensburg station, you got a straight piece of track.

Q. So it would be reasonable, could we assume, then, that there is a straight piece of track for almost seven miles, and that prior to reaching the crossing where this accident occurred, that the distance would be almost four miles, having due regard for the small distance before you make the curve and go into the seven-mile stretch?

A. Close to four, yes.

Q. Close to four.

Mr. McKevitt: You mean, if I understand you, approaching the crossing from the east, you have approximately four miles tangent or straight stretch of track; is that [238] correct?

Mr. Etter: That is correct.

Mr. McKevitt: Is that your testimony?

A. Close to four.

Mr. McKevitt: All right.

A. After you depart from that curve at Ellensburg.

Q. (By Mr. Etter): So counsel understands it, when you mean close to four, you mean it would be four miles if there wasn't the small amount that you started out with on the curve?

(Testimony of Francis William Scobee.)

A. That's right, it is about four miles to the depot to that crossing, and that curve is just—well, just a few feet. It is, oh, a couple of hundred feet, I guess, from the depot. We'll say you hit this curve and after you round that, then you got a straight stretch, oh, better than three miles, pretty close to four, I would say.

Q. All right. Now, Mr. Scobee, on the date in question, after you left the Ellensburg station, can you tell us, can you give us an idea of the speed of your train when it reached the curve and it started out on this straight stretch?

A. Well, the speed of my train, I couldn't tell then, because we changed train crews at Ellensburg.

Q. I see, at Ellensburg. [239]

A. And it is my duty when we change train crews——

Mr. McKevitt: Keep your voice up, please.

A. It is my duty when we change train crews, that we have to make a standing test with the air brakes.

Q. (By Mr. Etter): Yes?

A. And the new brakemen and conductor that are getting on the train have to check them brakes.

Q. All right?

A. And then when we depart and are on the move, I have to make a running test, what we call a running test with the brakes, and the brakemen, they hang out from the side of the train and see if the brakes are working.

Q. When you make this running test of the

(Testimony of Francis William Scobee.)

brakes, at what speed do you make your running test?

A. The speed reaches up to about 15 miles an hour.

Q. 15? A. Yes.

Q. You make a brake test at 15 miles an hour?

A. Yes, because I have the throttle open and in a pulling way, so if I don't stop the train when I set the brakes, I have got to have some pulling power to keep my train moving.

Q. And you keep it moving? A. Yes.

Q. And you keep it that speed when you give the braking [240] power and they, of course, are out observing; is that correct?

A. They are observing, and then I am checking my speed to see—I can tell, we'll say, if I reached a speed limit of 15 miles an hour and I make an application of the brakes of 10 pounds, we'll say, my speed will drop back with the throttle maybe to 10 miles an hour. That gives——

Q. You don't make any "big hole" application?

A. No, no.

Q. This is a 10-pound application?

A. What we call a service application.

Q. A service application, that's right.

A. By making that application and watching my speed and watching back at the brakemen, they give their "high ball" if things are satisfactory with them, and then I check my speed and I can tell the way my train is slowing down with the throttle that my brakes are working.

(Testimony of Francis William Scobee.)

Q. And when you made your brake test, it was okay, and you got the "high ball"?

A. That's right.

Q. Right? And then you started into your run, is that right? A. That's right.

Q. Do you know how far that you were from Ellensburg when [241] you made the test and before you started your regular run?

A. Well, we'll say I was about a train length or train length and a half by the time I made these tests.

Q. And after you made the test, then you opened the throttle and started?

A. That's right.

Q. All right, and will you tell us the distances at which you reached any particular speed?

A. Well, after leaving Ellensburg that particular day, they was doing some bridge work about two miles from the station and there was a speed limit of 35 miles an hour over this particular piece of track, and I guess——

Mr. McKevitt: How many miles an hour?

A. About two miles, around about two miles.

Mr. McKevitt: No——

Mr. Etter: 35.

Mr. McKevitt: Your speed limit was 35 miles?

A. 35 miles an hour over this particular piece of track.

Q. (By Mr. Etter): That was zoned for 35 on that date, isn't that right? A. That's right.

Q. All right. And I assume that you maintained

(Testimony of Francis William Scobee.)

your zone speed of 35 miles an hour that first two miles?

A. The first two miles I had got up to higher speed than that. [242]

Q. You had got up to a higher speed?

A. Yes. And when I came into this slow speed, I reduced my speed to 35 miles an hour for about a quarter of a mile until I had reached far enough for the rear end of my train to get over this slow piece of track.

Q. I see. Then, the whole two miles wasn't the 35 mile speed?

A. No, just over this particular piece.

Q. So what you did, for the first part of it, you reached for the first part of this two-mile portion, you reached a speed in excess of 35, but then slowed down and throughout the area of the speed zone you maintained 35 until you left the area?

A. That's right.

Q. Which was about two miles, or more or less, from the crossing?

A. That's right.

Q. Grade crossing?

A. That's right.

Q. All right, then you increased your speed?

A. That's right.

Q. All right, what speed were you traveling after you left the speed zone plus an additional mile?

A. Oh, I probably maintained a speed and was still [243] climbing, about 50 miles an hour, 55, in another mile.

Q. I see. In other words, when you were about

(Testimony of Francis William Scobee.)

a mile from the crossing, or 5,280 feet, you were probably maintaining a speed of 50 to 55 miles an hour? A. That's right.

Q. That's right. And going into the last mile and during the last mile, what speed did you reach?

A. I had probably got up to 60, a little better.

Q. Up to 60? A. That's right.

Q. And what speed had you reached when you were—Well, let me ask you this: There are some signals, are there not, that are about, oh, around 4,500 or 4,600 feet from the crossing, east?

A. Approximately, yes. I don't know, though, I have never measured it or never heard just how much it is.

Q. Would you say that is a fair statement of the distance of those? That is a block signal, isn't it? A. A block signal, yes.

Q. Would you say that the block signal is characterized by one of these poles up in the air with these green, red, and what not; isn't that right?

A. That is a block signal.

Q. Electrically operated, automatic operation?

A. That is a block signal. [244]

Q. Would you say, could you tell me whether or not the distance from those block signals to the crossing is about nine-tenths of a mile or somewhere in the area of 4,750 or 4,800 feet? Would that be it approximately?

A. If I told you, I wouldn't know, because I don't, I don't know just what the distance is.

Q. You don't know?

(Testimony of Francis William Scobee.)

A. I am very familiar with that track, but still I couldn't tell you in measurements just how far that block is from that crossing.

Q. Could you tell us about how fast you were going when you went past that block signal?

A. Well, I couldn't tell you.

Q. What speed did you reach before you came to the underpass, the overpass, rather, the Milwaukee overpass?

A. I had probably reached a speed of about 63, 64 miles an hour.

Q. 63 or 64. Do you know definitely?

A. Well, no, just only figured I was doing about that speed at that time.

Q. How did you figure that?

A. Well, coming on the overpass at that time, emergency came up there and I didn't get no chance to look at no speedometer. [245]

Q. All right, then, what was the highest speed that you reached before you got to the overpass?

A. To my estimation, it was 60 miles an hour, the last time I got to look at my speedometer.

Q. 60 miles an hour? A. Yes, sir.

Q. That last time you looked at it. And when was the last time that you looked at it?

A. Approaching the whistle post there coming into this grade.

Q. Approaching the whistle post?

A. Yes, sir.

Q. Do you know about how far east of the whistle post you were?

(Testimony of Francis William Scobee.)

A. I never measured it, I don't know.

Q. And you were proceeding then, you say, at what was indicated on your speedometer, or tape, I guess it is, isn't it? A. Uh-huh.

Q. 60 miles an hour? A. About that, yes.

Q. Would you have been a train length the other side of the whistle post, do you know, or closer than that to the whistle post?

A. I couldn't tell you. [246]

Q. But you do indicate that at least you recollect this speed by seeing the whistle post or being in some close proximity to it?

A. Yes. When I approach the whistling post like that, then my eyes are diverted to the crossing.

Mr. McKevitt: You are talking too fast and too low, Mr. Scobee. I have got to hear you.

A. You will have to pardon me. Right in here, it sounds like I am talking loud.

Mr. McKevitt: Well, you heard Judge Driver talking about our voice and how loud Mr. Etter and I talked. You talk as loud as both of us and then we will both hear you.

Mr. Etter: That will be quite difficult.

Mr. McKevitt: At least as loud as Mr. Etter.

A. Where was I?

Mr. Etter: You had just answered, I think, something about you hadn't looked because your attention was diverted by the whistle post or something.

A. Yes. When we arrive at one of those whist-

(Testimony of Francis William Scobee.)

ling posts, well, then your attention is diverted to the crossing.

Q. I see.

A. And, of course, your speedometer is down on a panel down to the left and you got to take your eyes down and look, if you are going to check your speedometer.

Q. I see. [247]

A. So at this particular point approaching this whistle post, of course, I have got to direct my attention straight ahead, and that is the last time I looked at the speedometer and it was approximately or about 60 miles an hour.

Q. That was the last time you looked at it?

A. Yes, sir.

Q. Now, the Diesel equipment that you operated that day, Mr. Scobee, were you and the fireman both up in the front part of the Diesel?

A. Yes, we were.

Q. And on those Diesels, the observation part or the operator's part, that is where the engineer and the fireman are generally, is right up in the very front end, is it not correct?

A. Close to the front end.

Q. Close to the front end. In other words, the front end of the Diesel comes up something like that (indicating) and there is a glass windshield right up here and you fellows sitting right up back of that glass windshield?

A. There is about an, oh, about seven foot difference there.

(Testimony of Francis William Scobee.)

Q. Seven foot difference?

A. Rounds up and then up to your windshield.

Q. Rounds up, but what I mean——

A. But straight figures, as far back as I sit, straight figures would probably be about seven to nine feet.

Q. Seven to nine feet, but there is absolutely no obstruction to view, is there? A. No.

Q. In other words, those windshields are large panels of glass and you have a perfect view all around looking straight ahead?

A. That's right.

Q. It is unlike the old steam jobs where you have to lean out the side? A. That's right.

Q. Considerable, is it not, from where you are set well back any number of feet from the front of the locomotive; these aren't like that at all?

A. No.

Q. Your throttle in a Diesel, is that directly in front of you, within reaching distance?

A. It is within reaching distance, but it is just a little to the left of me.

Q. A little to the left?

A. On my left-hand side.

Q. And your braking, how is that handled? Is that handled with a small bar, your air? [249]

A. It is on my right-hand side and a little up.

Q. A little up? A. Yes.

Q. Is it in the form of a bar, hand bar?

A. Yes.

Q. Can you tell me whether or not when you

(Testimony of Francis William Scobee.)

apply your air, you swing it left or right, or whether it is to you or from you?

A. You pull it.

Q. You pull it? A. Towards you.

Q. Speaking of the brakes now?

A. Talking about the brake, yes.

Q. Yes. And the throttle works how on the left side?

A. The throttle works the same way on the left side, you pull it towards you. That is opening it up.

Q. To open the throttle up, you pull it towards you, and to close it, you close it up, is that right?

A. That's right.

Q. And on the brake, in order to brake your Diesel, you pull the throttle towards you on the right?

A. To brake the Diesel, you have to pull it to you on the right.

Q. On the right. Now, is that brake or that throttle marked so that you can see the application of air [250] pressure with your use of the throttle? A. Yes, it has marks on there.

Q. It has marks on there? A. Yes.

Q. Which indicate the application, is that correct? A. We have gauges.

Q. Gauges? A. Air gauges.

Q. And you can tell from the gauges?

A. Yes, if I look.

Q. I see. Now, if you were going to give it a "big hole" or a dynamite stop and you were proceeding along at a clip of, say, 50 miles an hour,

(Testimony of Francis William Scobee.)

and you were going to apply a dynamite stop, having regard now to the place that you have your throttle and the brake and the manner in which they operate, will you tell us how you would do that, what you would do?

A. If I just wanted to go into emergency?

Q. Yes? A. And my throttle was open?

Q. Yes.

A. Shut my throttle off, push it away from me, and pull the brake valve clear over as far as she will go.

Q. Pull it over as far as it will go, is that correct? A. Yes, that's right. [251]

Q. All right. Having due regard now to the fact of your description of the three-piece Diesel unit which you were operating on that day, the fact that you were pulling seven or eight cars, can you tell us what length in feet would be required for you to stop that train if the train was proceeding at a speed of 60 miles an hour——

Mr. McKevitt: Go ahead, I'm sorry.

Q. (By Mr. Etter): ——and you applied a dynamite stop or "big holed" it, in the parlance of the railroad?

Mr. McKevitt: Object to that question on the ground that it is a hypothetical question and it doesn't include the factors which are necessary to enable this witness to answer, if he is able to answer, and his qualifications to answer the question of that kind have not been established.

There are a lot of factors, if the Court pleases,

(Testimony of Francis William Scobee.)

that enter into stopping distances which, necessarily, have to be included in a hypothetical question and certainly are not present in this question, the question being hypothetical in nature and not sufficient factors introduced to permit to answer as an expert.

Q. (By Mr. Etter): Were you present, Mr. Scobee, throughout these proceedings? Have you been present? A. Yes, sir.

Q. Were you here when Mr. Adams, the engineer, testified, [252] that is, I suppose, the civil engineer, certainly not a locomotive engineer? Were you here when he testified? A. Yes, sir.

Q. Did you hear him testify as to the percentage of grade leading from the various parts of the railroad extending in an easterly and westerly direction outside of the City of Ellensburg?

A. Vaguely, yes.

Q. Beg your pardon? A. Vaguely, yes.

Q. Well, you as an engineer, having run over there, are you acquainted with the fact that there is a slight grade upwards? A. Yes, sir.

Q. Beg your pardon? A. Yes, sir.

Q. And, likewise, that is standard gauge track, is it not? A. Yes, sir.

Q. What is standard gauge, four feet, eight inches or eight and a half inches, between the inside of the two rails? A. Inside rail.

Q. Inside the two rails?

Mr. McKevitt: Oh, say, on that, Max, so we will be in agreement—— [253]

(Testimony of Francis William Scobee.)

Mr. Etter: All right.

Mr. McKevitt: Gauge of the railroad, measured inside of rail to inside of rail—remember when I talked to you about that yesterday—four foot, eight and a half inches.

Mr. Etter: All right. As I understand it, then, the inside——

Mr. McKevitt: So that may be stipulated, your Honor.

Q. (By Mr. Etter): That is standard gauge, is it not? A. Yes.

Q. And you heard the testimony with respect to the grade, is that correct?

A. Vaguely, yes. There was ups and downs there and I haven't got them down in my mind just what it is.

Q. I see. All right, then, let me ask you this: Mr. Adams indicated, as I recall it, that the grade was slightly upward in very minimum percentage points. Do you understand that?

A. Different points, there was a variety of ups and downs.

Q. But minimum in most instances, is that correct? A. Yes.

Q. And you have operated over that line of road many times before? [254] A. Yes, sir.

Q. And isn't it a fact that the grade is very minimum at any particular point on that straight stretch? A. Very small.

Q. Very small. And those rails are uniform rails in weight and poundage, are they not?

(Testimony of Francis William Scobee.)

A. Yes.

Q. That are used generally on the main line of the Northern Pacific? A. Yes.

Q. Is that correct? A. Yes.

Q. All right, how was the weather that day?

A. Clear day.

Q. Beg your pardon?

A. It was a clear day.

Q. It was a clear day? A. Yes, sir.

Q. And was there any snow or slick or ice or otherwise on the rails that was visible to you?

A. The rail was dry.

Q. The rail was dry? A. Yes.

Q. When you made your practice stop, did your train react in the same fashion it had at other times when you made [255] your practice stop with respect to those rails?

A. What are you referring to by "practice stop"?

Q. Well, your checking your brakes, I should say, when you came out of Ellensburg?

A. The brakes were working good.

Q. I know, but was it uniformly the same operation, the same result as you had on other occasions?

A. Yes.

Mr. McKevitt: If the Court please, with reference to the previous question, counsel uses the term "practice stop." Now, that, as I understand it, is just coined by counsel himself. I don't recall any testimony from this witness that at any time—

(Testimony of Francis William Scobee.)

The Court: He meant the practice test of the brakes.

Mr. McKevitt: —that there was any practice stop. There is a difference between a practice stop and just a testing of brakes.

Mr. Etter: Of course, I changed it, Mr. McKevitt, and got all over it. The witness said——

Mr. McKevitt: I don't like that "practice stop."

The Court: Well, I think counsel changed that and said he meant practice test of the brakes.

Q. (By Mr. Etter): It was a practice test, wasn't it, it was a practice test?

A. It is a practice to make that test. [256]

Q. It is a practice to make that test?

A. Yes.

Q. And you did make that test to determine, of course, as you have said, the application of your brakes; is that right? A. Yes.

Q. Surely. And I think you said it was uniform in respect to other times that you had made the same test with respect to the same rule when you took on new men in the engine crew?

A. That's right.

Q. And would you say the tracks in all respects, then, were, as you say, dry? A. Yes.

Q. And the visibility was good? A. Good.

Q. Was there any defect in your operating mechanism that you noticed in your Diesel?

A. There was nothing wrong with the equipment at all.

Q. Nothing wrong with the Diesel?

(Testimony of Francis William Scobee.)

A. No.

Q. And on that, had you ever had occasion to dynamite a train on that particular run?

A. Not on that particular run I have never done it.

Q. Have you ever had occasion to dynamite Diesel equipment [257] when you were operating with a passenger behind you?

A. No passenger train.

Q. No passenger train. You have made dynamite stops? A. Only on freight.

Q. Only on freight. You know what they are?

A. Yes.

Q. I see. You had, of course, operated the particular train that you were operating that day, I think you said 12 or 15 times previously on that run?

A. I have operated about that many times.

Mr. McKevitt: Pardon me?

A. I have operated about that many times, but I couldn't pin point it down to how many times.

Q. (By Mr. Etter): Your run originated in Yakima, where does your run stop?

A. At that time, at Seattle.

Q. In Seattle? A. Yes, sir.

Q. During the time that you were operating the train on these various runs between Yakima and the City of Seattle over this particular line, I assume that the gauge of the track is the same all the way? A. The gauge is the same.

Q. And that you have different places where

(Testimony of Francis William Scobee.)

you have upgrades and where you are on the level during that [258] particular run of yours from Yakima to the City of Seattle? A. Yes, we do.

Q. And that at varying places under varying conditions, you have made stops of that train and starts of that train during those 12 or 15 times that you have operated? A. Yes, sir.

Q. Is that correct? A. That's right.

Q. That's right. And you were familiar with the operation of that train in the way it reacted to braking power? A. That's right.

Q. Is that correct? A. Very familiar.

Q. And you were familiar with the Diesel and the mechanical aspects of the Diesel and the way it reacted to braking power? A. Yes, sir.

Q. Is that correct? A. Yes.

Q. At varying speeds?

A. Yes, there is varying speeds that you have to try your air.

Q. That's right. [259]

A. That you get reactions.

Q. All right. Now, on this particular day, or, rather, I will ask you, with reference to the knowledge that you have and which you have testified to, I will ask you if you can tell us, in the operation of the particular train that you were operating on that particular day, which was composed of three units of a Diesel and seven or eight passenger cars, and the train was proceeding on standard gauge track, which was dry and in good condition, and you were proceeding at the slight grade as is indi-

(Testimony of Francis William Scobee.)

cated by your testimony, and that proceeding along in that particular equipment on the particular grade as described and on tracks in the manner in which I have stated them to be, with clear visibility and the other conditions which have been indicated in your answer, can you tell me in what length in feet it would be required to stop the train which you are operating with the equipment that you were operating, if you were to make a dynamite stop, proceeding at a speed of 60 miles an hour.

A. I don't—

Mr. McKevitt: Just a moment. I object to that on the ground that it is a hypothetical question in nature and he hasn't included in here the factors that are necessary to permit the witness to intelligently answer. And one of [260] them, and probably the most important one, your Honor, and about which this witness hasn't been interrogated, is the total weight of this train. There isn't a scintilla of evidence as to what this train weighed, and whether this man knows, I don't.

The Court: This question is whether he knows or not. You may answer that question.

A. I don't know.

Q. (By Mr. Etter): You have been an engineer for how long? A. Since 1945.

Q. Since 1945? A. Yes.

Q. Your testimony is now that with your experience in driving this train, you don't know when you can stop or what length you can stop it at any speed; is that it?

(Testimony of Francis William Scobee.)

A. Well, we don't make a practice of dynamiting the train only in emergencies.

Q. In emergencies? A. That's right.

Q. All right. A. So I wouldn't know.

Q. Beg your pardon?

A. We don't make a practice of it unless it comes up to emergencies, and then we dynamite our train, so I have no idea. [261]

Q. Have you ever received any instruction in your training as an engineer as to your braking power and the amount of braking power required to stop a train going at various speeds?

A. Experience is the best teacher.

Q. No, have you ever had any instruction in that?

A. We have instructions, I passed the test.

Q. You have had tests?

A. But we never took tests on taking trains out and dynamite them to see how far it was going to take to stop them.

Q. No, but haven't you had instruction and haven't you answered questions that relate to the braking power necessary to stop a train at a particular number of feet going a particular speed under all and various conditions as an engineer?

A. Well, your weights and everything change on all trains.

Q. Yes, but you have instructions, have you not, on that? A. Yes.

Q. Beg your pardon?

A. We have some instructions, yes.

(Testimony of Francis William Scobee.)

Q. And you had operated this train for 12 or 15 times prior to this date in question, and your testimony here now is that you don't know what amount of air or what pressure would be required to stop that train if you [262] had to stop it under an emergency?

A. I know what air I have got.

Q. Yes.

A. And I know what brake valves I've got on my engine.

Q. That's right.

A. And when an emergency comes up, there is only one thing to do and that is dynamite the train, and how far it is going to stop, I can't tell you.

Q. Your testimony here now is you haven't got the vaguest idea, as I understand it, you haven't got the vaguest idea, although you are taking this train along the track this day at 60 miles an hour, you haven't got the vaguest idea of how quick you could stop it if you were confronted with an emergency; is that your testimony?

Mr. McKevitt: If your Honor please, for the purpose of the record and so I won't be continually objecting, he is trying to force this engineer to make an expert out of himself as to stopping distances so as to establish certain allegations in his complaint.

Mr. Etter: If counsel has an objection, I wish he would make it, because I am prepared to make a speech, too, if that is what this is.

(Testimony of Francis William Scobee.)

Mr. McKevitt: Well, I am stating the reasons for my objection [263]

I will object to this line of examination for the reason that he is trying to qualify this man as an expert, and he hasn't given him the data on which to intelligently answer a question, if he is able to.

Mr. Etter: This man has testified he takes a passenger train at 60 miles an hour and he has been an engineer for nine years on the Northern Pacific Railroad and he has taken examinations and qualifications as an engineer and has pulled this same train for 12 or 15 times, and the Northern Pacific apparently takes the position that even though he is an engineer and entrusted with a passenger train, he isn't qualified to testify about the very job they have given him to do.

Mr. McKevitt: I object to that.

The Court: Just a minute.

Mr. McKevitt: I ask that the jury be instructed to disregard that statement.

Mr. Etter: And why?

The Court: I will instruct the jury to disregard all of the argument of counsel. It has nothing to do with your duties here, you pass upon the facts, so disregard all the argument.

I think that the witness has testified that he doesn't know. We will have to let him stand on that, that he doesn't know what it is. [264]

Mr. Etter: All right.

Q. Can you tell me this, do you know what application of air it would take to stop your train,

(Testimony of Francis William Scobee.)

or how many feet you would travel in that train, if you were going 20 miles an hour and you applied an emergency "big hole" or dynamite stop?

A. Well, as I say, your trains vary in weight, length, and conditions and everything varies, so I couldn't give you an intelligent answer. When running a locomotive with trains that vary in different weights, lengths and stuff like that, you can't give an intelligent answer, unless you are an expert on it and take that subject up.

Q. Well, you don't know the weight of any of your passenger cars, is that it?

A. No, I don't.

Q. That you have been hauling, you don't know what the weight of one of those cars is?

A. No.

Q. What other conditions did you have reference to other than the ones I have inquired about, Mr. Scobee?

A. Well, you have different engines, whether you are under steam power, Diesel power.

Q. I inquired of you, of course, as to the particular Diesel power you were using that day. [265]

A. Yes, we had a Diesel that day.

Q. So you have that in mind, you know the weight of your Diesel equipment and you know the system of the Diesel operation, that is, as to your throttle and as to your air brakes; isn't that right?

A. Yes.

Q. You know that?

A. Yes.

Q. And you know the weight almost of your

(Testimony of Francis William Scobee.)

three units, I mean you would have that, and you know the number of cars and their length that you have; is that correct?

A. Approximately, about.

Q. So the only thing that you don't know is the weight of each one of those cars or the collective weight of the total, isn't that right?

A. Well, that wasn't given to me, but you handle that equipment and you make them air tests, you have the feeling of what you have got in brake tests, the standing test and the running test. You have got a feeling of just about how much that you can do and how much air to apply, and experience, it is the running of it and the handling of trains day after day, that it is just a feeling that you get from experience.

Q. Well, then, you don't have to know the weight of those cars, isn't that your testimony, in order to know how to use your brakes? [266]

A. Well, not always on passenger, but on freight we usually get the tonnage of the train we are carrying and the length of train and how many cars.

Q. What equipment are you operating now?

A. I am still working the extra board.

Q. You are still working the extra board?

A. I handle all kinds of equipment.

Q. Have you handled this particular run that we are talking about lately?

A. Not recently, no.

Q. When was the last time?

(Testimony of Francis William Scobee.)

A. Oh, I couldn't tell you. It has been, oh, six months or better.

Q. Six months ago or better?

A. I just—I am just guessing there because I don't know just exactly how long ago it was now.

Q. Now, you have told us that you have made 12 or 15 of those runs up until 1952. How many, in addition to those 12 or 15, have you made after this accident on March the 8th of 1952?

A. There has been quite a few.

Q. Well, how many?

A. I couldn't tell you.

Q. Well, have there been more than 12 or 15?

A. I wouldn't say, no.

Q. Beg your pardon?

A. Not on that particular run, no.

Q. Well, have there been 10 more since 1952?

A. I couldn't pin point it.

Mr. McKevitt: You mean the same equipment?

Mr. Etter: Same equipment?

A. I couldn't tell just how many, no.

Q. Well, you say there are quite a few, though?

A. Well, we have two extra boards, and as the years go by, my seniority gets a little more and I have moved out to the Auburn board where I live.

Q. I see.

A. And I work out to Auburn now where I live, and they have two extra boards and the senior extra board is in Auburn, and as my seniority grew, I moved to my home town.

Q. To Auburn?

(Testimony of Francis William Scobee.)

A. I don't work out of Seattle any more, so it has been quite awhile since I worked one of them passenger jobs.

Q. You work in freight now?

A. Freight mostly, yes.

Q. I see. But you had worked that about 12 or 15 times and you have worked it, as you say, quite a few runs after that? [268]

A. I have been on it a few runs afterwards, I couldn't pin point how many.

Q. Well, did you operate that passenger train enough times, as you say, to get the feel so that you were able to know when to apply braking power and how much? Did you operate it enough to do that?

A. That is experience, yes, you get the feel of them.

Q. Well, did you have enough experience to get the feel of it? A. Yes.

Q. And hadn't you had enough experience on March the 8th of 1952 to get the feel of it?

A. Yes, I had the feel of the train.

Q. You had the feel of the train? A. Yes.

Q. And if you have the feel of the train, it isn't necessary after you make these tests to know what your equipment weighs, isn't that correct, that is, the cars?

Mr. McKevitt: For what purpose?

Mr. Etter: Now, just a moment——

Mr. McKevitt: Well, I object to the form of that question.

(Testimony of Francis William Scobee.)

The Court: Well, let's have the question.

(The question was read.) [269]

Q. (By Mr. Etter): In order to determine your stopping distances? If you have the feel of the train, isn't that what you mean by the feel of the train?

A. To know how much air to apply, you mean?

Q. Yes? A. To stop that train?

Q. Yes?

A. Well, it is like I say, you have got to have experience in the feel of this train.

Q. That's right.

A. And coming into stations for stopping for passengers, you don't look down at your air gauge, you are watching mostly where you are going to spot your engine for a spot.

Q. Exactly.

A. So I don't see how much air I draw off, I just make my stop and make it as smooth as I can so I don't knock anybody down in the passenger coaches.

Q. Isn't it a fact that when you come into any passenger station, that you have yourself a spot along that main line, you know when you got that spot you have to give it so much air, that you are going to put it where you want it?

A. It is not that easy.

Q. Well, you know it becomes that easy after you get the feel, isn't that right? [270]

A. After you get the feel of it, you get so——

(Testimony of Francis William Scobee.)

Q. You can pick yourself out a spot and start an application and stop?

A. Not necessarily, your trains vary. In a passenger train, we'll say maybe this day they might put three baggage coaches on it.

Q. All right.

A. The next trip might be only two, so your distances change, so you couldn't diagnose one spot that you are going to spot that train at.

Q. Mr. Scobee, if you knew the weight of your train, the weight of those cars, you already know your brake pressure, don't you, or your brake—what was that, 120 pounds?

A. 110 pounds train line pressure.

Q. 110 train line. If you had the weight of those cars and the number of cars that were on there, and knowing the 110 pounds of air that you had, could you tell us then by giving this train a "big hole" how long or how many feet would be required to stop if it was going 60 miles an hour and you applied a full "big hole" or dynamite?

A. No, I couldn't.

Q. You could not? [271] A. No.

Q. Can you tell us who can?

Mr. McKevitt: Oh, I object to that, if your Honor pleases.

The Court: I will sustain the objection to that question.

Mr. McKevitt: He wants us to furnish expert witnesses for him now.

The Court: I will sustain an objection to that.

(Testimony of Francis William Scobee.)

Q. (By Mr. Etter): How do you tell what your ability or your braking distance is under varying speeds? How do you determine that yourself?

A. By experience.

Q. By experience?

A. Of braking into stations, my station stops, and getting the feel of my train on your tests.

Q. Well, can you tell——

A. Your running tests.

Q. Can you tell us from your experience, your braking experience, how fast you can stop a train operating at certain speeds? Can you tell us that?

A. Well, the trains vary in length and weight and everything.

Q. That's right. So can you tell us the answer?

A. If we took different trains, I couldn't tell you, no. [272]

Q. Which ones can you tell me about?

Mr. McKevitt: Well, I object to the form of this question, if your Honor pleases. He is trying to qualify this witness as an expert in stopping distances under certain conditions by an emergency application. I assume a train of this character, I understood this witness to say he can't tell, and I think that it is a question of proving a case by expert testimony and it should be proved by some witness that he produces himself, instead of trying to make this engineer an expert on behalf of the plaintiff.

I object to this as being an improper examination under the adverse rule.

(Testimony of Francis William Scobee.)

Mr. Etter: I doubt, your Honor, that I am making him an expert; I am trying to find out if he is qualified to tell us. I don't know of anybody better than the engineer that I could get on that. He has given me these qualified answers and I merely asked under what conditions he can testify. He says when he gets the feel of the trains and they are all different. Well, he has operated a lot of different ones; I want to find out as to each of the different ones as to whether he can tell us.

The Court: I will excuse the jury for the mid-afternoon recess.

(Whereupon, the following proceedings were had in the absence of the jury:) [273]

The Court: I think the adverse party rule is set out in Rule 43, Subdivision (b), of Rules of Civil Procedure, and this witness is no longer, of course, an adverse party——

Mr. McKevitt: No.

The Court: He has been dismissed as such, he is not an adverse party, and he isn't an officer or managing agent of the Northern Pacific Railway Company, so that the only right you would have to cross-examine is under 43(b), which is:

“A party may interrogate an unwilling or hostile witness by leading questions,” and: “A party may call an adverse party or an officer, director, or managing agent of a public or private corporation,” etc., but he is not in that class, and I don't think you would be justified in going any further in this line of examination.

(Testimony of Francis William Scobee.)

Mr. McKevitt: I think we had that deal in the Stintzi case, you remember, Mr. MacGillivray's idea as to who is a so and so in connection with the railroad company.

Mr. Etter: It wasn't as to an engineer, however, at that time. [274]

Your Honor, departing from that, it seems to me that the only person that is qualified to tell us anything about this particular train is the man that operates it. I mean, if there is anybody that can tell us anything more about starting it or stopping it than the engineer, I don't know who it would be.

The Court: Well, I don't recall any reluctance or hesitancy on this witness' part in telling you exactly what happened on the day of this accident, but now you are asking him hypothetical questions.

Mr. McKevitt: That's right.

The Court: As to how far it would take to stop this particular train. Well, unless he as a locomotive engineer has learned by experience, obviously, he isn't going to be able to sit down and draw a graph for you and say friction so much and weight so much and distance and time, and so on, and work out one of these formulas that it takes a mechanical engineer and a very good one, I should think, to figure out.

Mr. Etter: I grant that. Your Honor, I certainly don't think I have inquired of this witness as to that formula. He said it is a matter of experience and everything, and if he comes within 2 or 300 feet, I'm not questioning it, that's all I want.

(Testimony of Francis William Scobee.)

The Court: Well, he has a right to refuse [275] to estimate or guess, and he says that the only way he can tell is by experience, and he has never had any experience stopping a train by dynamiting it so he hasn't any basis of experience and he declines to estimate on any other basis, and I think he has a right to do so.

Court will recess for 10 minutes.

(Whereupon, a short recess was taken.)

Mr. Etter: Your Honor, on the matter of the examination of the witness and after examining the complaint, I would like to call your Honor's attention to some relevant allegations which we have made.

For instance, on Page 3, (a), we have said that they drove the train in a negligent——

The Court: That is what paragraph?

Mr. Etter: Subparagraph (a) on Page 3 of the complaint, and likewise Subparagraph (e).

Mr. McKevitt: Sub (e) on page what?

Mr. Etter: 3. Subparagraphs (a) and (e), and Subparagraph (a) on Page 4 and Subparagraph (c) on Page 5.

Mr. McKevitt: What is on Page 4, what paragraph?

Mr. Etter: On 4 is Subparagraph (a), and Subparagraph (c) on Page 5.

The thought I have in mind, your Honor, is that the examination of this kind, I probably, I think, under [276] those allegations, I have a right to show that if a man is operating a train at the

(Testimony of Francis William Scobee.)

speed at which this man says he was operating it and doesn't have any idea, as he claims he doesn't, any idea of the control that he exercises over the train by stopping it, that he certainly is guilty of a reckless disregard and is guilty of negligence in the operation of the train at that speed.

The Court: Well, you have proven that, haven't you?

Mr. Etter: Beg your pardon?

The Court: According to your theory, you have proven that he didn't know how long it would take to stop it.

Mr. Etter: Except the one question I asked if he had any idea. I wanted to see if he had any idea of what distance he could stop the train going at that speed. If he says he has no idea, I think I have conclusively proved he was guilty of negligence.

If you remember, your Honor sustained the objection to that question.

The Court: You have a right to interrogate as to what he did and what happened and what happened to the train as it approached this crossing, but when you get into the realm of hypotheses here as to how far it takes to stop a train weighing a certain amount, this particular train, I don't think you can require a witness, who doesn't think [277] he is qualified and doesn't appear to be qualified, to require him to testify as an expert.

Mr. Etter: No, I meant to change the question, though, not go into any hypothesis, and ask

(Testimony of Francis William Scobee.)

him if he had any idea of how soon or how quickly he could stop that train going at the speed he was and have him answer without regard to weight or anything else, to show that if he was operating at 60 miles an hour and didn't have any idea of how soon he could stop it, he was certainly guilty of reckless disregard going that speed without ever knowing how he was going to stop the train or when.

Mr. McKevitt: You are not arguing the admissibility of evidence now, then. As I understand it, what he is trying to deduce from that statement is that by virtue of this man's admissions that he doesn't know this, that and the other ergo prop hoc, the fellow must have been negligent in operating that train. If he wants to stand on that proposition, I will meet him on it any time.

Mr. Etter: Well, I am merely saying and I am suggesting to the Court what I am trying to prove by this witness. Now, in accord with my allegations, if he doesn't know how to stop his train or when he can stop it and he still runs it down the track 60 miles an hour, it is a question of fact for this jury to determine whether or not he operated it recklessly with an indifferent disregard of [278] people who were using these highways across the track.

Mr. McKevitt: Why don't you ask him what he did?

Mr. Etter: I am addressing my remarks to the Court and I am telling the Court what my purpose

(Testimony of Francis William Scobee.)

is. And I think the same as I would have in an automobile case, where there was a speed of that kind, I have a right to find out whether the driver had it under control, which is certainly negligence in the operation of a moving vehicle and would certainly be negligence in the operation of this train.

The Court: Well, I connected up your question with the matter of trying to get him to testify as to how many feet or approximately how many feet it would take to stop this train if he dynamited it.

I think you have a right to inquire as to what control he was exercising or what he knew about length of time it would take to stop or the distance it would take to stop it.

Mr. McKevitt: An emergency stop. Mr. Etter has been talking to this witness about the "feel" of a train, the "feel" of a train, the "feel" of a train. The witness says yes, but the witness is talking about a normal stop going into a station. He has testified, as I recall it, that this is the first time that he was ever met with an emergency wherein he was required to "big hole" or dynamite the train. Now, Mr. Etter is trying to force him [279] to testify, that under those conditions that existed that day, I assume, that he should tell the jury that he could have stopped that train within some distance. Now, if the witness says, "I don't know," that certainly ought to end that examination.

Mr. Etter: Well, if a man is operating a moving vehicle, he is going 60 miles an hour, he testifies

(Testimony of Francis William Scobee.)

that he hasn't got any idea of when he could stop that, I say that is a reckless and wanton negligence. I haven't any right to operate an automobile down the street at such a speed that I haven't got any idea where I can stop it.

Mr. McKevitt: Have you alleged in this complaint that this man was an incompetent engineer?

Mr. Etter: Don't have to allege he is incompetent.

The Court: Well, I think that is rather far-fetched. They don't have to take every engineer out and have them dynamite trains at every crossing in order that they will know exactly what the reaction will be and how long it will take them to stop them. Nor do I think you could prove a case against a driver of an automobile if you proved he was going 50 miles an hour, within the speed limit, and then get him on here and ask him, "How long would it take you to stop your car if you jammed all the brakes on?" I don't know, I am negligent every time I drive a car, if that is the case, because I don't know how many feet it [280] would take if I pulled the emergency and put the foot brake on to stop my car, and, yet, I have a right, I think, to drive my car around over the highways.

Mr. McKevitt: May I make this further observation in connection with calling your Honor's attention to the case of Dean vs. Northern Pacific, Mr. Williams on the other side?

Now, what Mr. Williams did, and what he is trying to establish here, and he is going to be

(Testimony of Francis William Scobee.)

driven to it, is this last clear chance doctrine. Now, your Honor will recall that in that Dean case, the plaintiff's attorneys in advance had taken the deposition of the engineer, and they had ascertained the weight of every unit, the type of brakes, the grade of the track, and so on, and so on, and then they called an independent third party as an expert and, based upon those facts, they presented a hypothetical question to him. Now, that is what Mr. Etter should do here, but he is trying to make this fellow an expert against himself. He sued this man for \$35,000 and his chestnuts come out of the fire, and now he is trying to make this fellow a witness against himself.

The Court: That is beside the point, but bring in the jury, we will proceed, then.

(Whereupon, the following proceedings were had in the presence of the jury.) [281]

Q. (By Mr. Etter): Mr. Scobee, as I gather it, you remember it by seeing the whistle post, your train had reached a speed of 60 miles an hour; is that correct?

A. It was about that speed, yes.

Q. All right. Will you tell us what happened after that?

A. Well, after glancing at the speedometer and approaching this whistle post, the whistle post is a sign that you are approaching a crossing and prepare to start blowing your whistle for this crossing.

Q. All right.

A. And I had reached for the whistle and

(Testimony of Francis William Scobee.)

started my procedure of blowing the whistle for this crossing.

Q. All right?

A. I had blowed one long whistle, and then there is a pause, and blowed another long whistle, and then this truck——

Q. Where were you? Where were you when you blew one long whistle?

A. One long, and then a pause, and then another long one.

Mr. McKevitt: And another long?

A. Another long.

Q. (By Mr. Etter): A long whistle, what do you mean by a "long" whistle, would you tell us?

A. Well, at grade crossing, on your road crossings over railroad track, we have two long and a short and a long whistles we blow for those crossings for a warning.

Q. The first one you blew was the long one?

A. The long whistle.

Q. All right, how many seconds is a long whistle?

A. Well, I couldn't point that out, how much time I took to blow that whistle.

Q. Well, would it be two seconds?

A. Oh, we'll say a second.

Mr. McKevitt: Is that the first long whistle?

A. First whistle.

Q. (By Mr. Etter): You say the second is a long whistle?

(Testimony of Francis William Scobee.)

A. I can't pin point it to seconds, I don't watch how long it takes me to blow this whistle.

Q. Well, I am going to make a noise for a second and ask you if that is a long whistle, just so we can try and get it straight. "Toot," is that a long whistle? A. No, that is a short.

Q. All right, what would a long whistle be, then, in seconds?

A. Well, your long whistle would run probably two seconds or a little better.

Q. Two seconds or a little better? A. Yes.

Q. So you gave a long whistle, is that right?

A. Yes.

Q. And then a pause? A. Then a pause.

Q. How long a pause?

A. I couldn't tell you.

Q. Well, would it be one second or two seconds?

A. Well, there was a pause in there, but I couldn't tell how long it was.

Q. It would be one second, at least, wouldn't it?

A. It would be more than one second, yes.

Q. Well, make it brief, would it be two seconds?

A. Around that neighborhood, I couldn't pin point it.

Q. Then you gave another long whistle?

A. Another long.

Q. Beg your pardon?

A. Another long whistle, yes.

Q. All right. And then what happened?

A. Then this truck showed up.

Q. When, right after the second long whistle?

(Testimony of Francis William Scobee.)

A. Yes, after I had ceased blowing the second whistle.

Q. I see. All right, when did you first see the truck?

A. Oh, I would say it was about 25 feet from the crossing.

Q. About 25 feet from the crossing. What direction? [284]

A. It was coming from the south to the north.

Q. Beg your pardon?

A. Coming from the south to the north.

Q. Coming from the south to the north. And where was your train when you saw that truck?

A. Oh, I would say, just guessing, I never measured no distance, but I would figure it was about, oh, 2 or 300 feet east of the viaduct, that Milwaukee viaduct.

Q. 2 or 300 feet east? A. Yes.

Q. Of the Milwaukee viaduct?

A. May have been a little more, I don't know.

Q. All right, and this whistle tooting you started, as I gather it, you started it as you came to the whistle post; isn't that right?

A. Yes, at the whistle post or shortly after the whistle post.

Q. Shortly——

A. I had arrived at the whistle post.

Q. You had arrived at the whistle post, and that is when you started whistling? A. Yes.

Q. In other words, you had arrived at the whistle post and tooted a long, and then you had a

(Testimony of Francis William Scobee.)

pause, and then you tooted another long, as I understand it, and after you [285] had blown your second long whistle, you were 2 or 300 or more feet east of the Milwaukee overpass?

A. I could have been, I didn't pin point it down to feet, I just—I knew I was east of the viaduct when the truck approached.

Q. How far were you east of the viaduct?

A. Well, I couldn't pin point that down, I don't know.

Q. You don't know in feet?

A. Not in feet, no.

Q. All right. And you saw the truck about 25 feet away?

A. It just came out in the clear and I figure about 25 feet from the crossing.

Q. How do you mean it just came out in the clear?

A. Well, it comes out behind that Milwaukee viaduct there, that overhead.

Q. Beg your pardon?

A. It comes out in the clear from that Milwaukee viaduct, cement pillars there.

Q. Is it your testimony that it comes out in the clear here (indicating)?

A. No, the Milwaukee viaduct has cement pillars on each side of our track.

Q. That's right, right here (indicating).

Mr. McKevitt: No, he is referring to the Milwaukee viaduct here, Mr. Etter (indicating). [286]

(Testimony of Francis William Scobee.)

Mr. Etter: I would like to conduct this examination, Mr. McKevitt.

Mr. McKevitt: Yes, you are pointing to the wrong viaduct.

The Court: I think you should let counsel conduct the examination.

Mr. McKevitt: I'm sorry.

Q. (By Mr. Etter): Would you come down and point out which one you have reference to?

A. Yes, sir.

(Witness goes to map.)

This is the east here (indicating) and the truck was coming up here. I would say when I first got a view of it it would be about 25 feet from the crossing here.

Q. About 25 feet? A. Yes.

Q. From the crossing?

A. I could see from back here east of this viaduct, I could see across here to this cement pillar and just see the truck approaching about 25 feet.

Q. About 25 feet, all right.

A. But how close I was in feet, I couldn't tell you.

Q. But you were the other side——

A. I was east of it, yes. [287]

Q. You were east of it, all right. You were not able to see it before that time?

A. No, it didn't come into view until that time.

Q. You didn't see it until that time?

A. No.

(Testimony of Francis William Scobee.)

Q. All right. Now, will you tell us then what happened?

A. Well, I made an application of the brakes. The truck came out in this kind of a blind area here (indicating). This Milwaukee viaduct, I made—I couldn't tell you how much of an air application I made, but I made an application of the brakes and felt the train take ahold, and then the truck momentarily stopped at the crossing.

Q. Stopped at the crossing?

A. Just momentarily stopped clear of the crossing.

Mr. McKevitt: Clear of the crossing?

A. Clear.

Q. (By Mr. Etter): You mean clear——

A. Of the road crossing over the track.

Q. Clear of the crossing on the south side of the crossing? A. That's right.

Q. How close was it to the crossing?

A. It was clear——

Q. Beg your pardon? [288]

A. Oh, it must have been 10 feet, anyhow, because it was clear of the track.

Q. It was clear. All right, and then what happened? A. I released the air.

Q. Beg your pardon?

A. I released the air that I had set on the train.

Q. You released the air. All right, then, and will you tell us what happened?

A. Then all at once the truck started bucking up onto the track.

(Testimony of Francis William Scobee.)

Q. All right, where were you when it started bucking? Where was your train?

A. I was coming under the viaduct at that time approaching the crossing. Oh, I would say——

Q. Coming into the viaduct, under the viaduct?

A. I would say about, oh, 600 feet from the crossing at this time.

Q. About 600 feet. When it started bucking, then what happened?

A. That is about—now, I don't know just exactly the measurements on that, but I was coming under the viaduct then when this happened.

Q. When it started to buck? A. Yes.

Q. That is, about 10 feet south of that crossing?

A. It was just clear of the crossing before it started bucking at——

Mr. McKevitt: Keep your voice up. I didn't hear that last part of the question and answer at all.

A. I had just released the air and then the truck started bucking up on the track just as I was coming under the viaduct.

Q. (By Mr. Etter): Just as you were coming under the viaduct? A. Yes.

Q. All right. So we have it now, as you hit the whistle post, you gave a long, a pause, and another long, and about that time you were still some 100 feet or 200 feet, as I gather it, or whatever distance you were, east of the viaduct?

A. I was east of the viaduct; how many feet it was, I don't know.

(Testimony of Francis William Scobee.)

Q. Well, have you got any idea of length as to your train, as to your Diesel? Could you spot it?

A. Well, that is two years ago and all I know is I was east of it.

Q. Well, you have been talking with Mr. McKevitt about this case before you testified here, haven't you? A. Yes, I have.

Q. At considerable length? [290] A. Yes.

Q. All right. Did you tell him everything that you remember?

A. I told him everything that I remember.

Q. I see. Showing you here the Defendant's 28, Exhibit 28, could you tell me, looking at that, whether that is about the distance you were when you saw the automobile?

A. Yes. It could have been that far.

Mr. McKevitt: Now, where——

Mr. Etter: Now, just a moment, counsel.

Mr. McKevitt: I want to see the exhibit.

Mr. Etter: Just a moment, now.

Mr. McKevitt: I want to see the exhibit.

Mr. Etter: All right.

Q. Would you say that was it, or were you closer?

A. That is a close proximity, because you can see right here, you can see the top of the truck coming out from this point over here (indicating).

Q. Were you closer than that, do you think?

A. Well, I could have been, but I can't tell you, see, pin pointing it down in feet. I can't tell you just how close it was.

(Testimony of Francis William Scobee.)

Q. Well, looking at Exhibit No. 27, do you think you were that close? [291]

A. Well, there isn't—it is a little closer, but it is pretty hard to tell.

Q. Well, could you tack it down to say it was some place between this picture and the one I just showed you, 27 and 28?

A. I couldn't say. All I know is that I was east of the viaduct and I just caught a glimpse of the truck, the top of the truck, coming up to the crossing, about 25 feet from the crossing.

Q. Would you say, though, in your opinion, it could be either this one or the other one?

A. It is a close facsimile, but I couldn't tell you how——

Q. Of where you were? A. Huh?

Q. Of where you were when you saw the truck?

A. Yes, but I couldn't tell you in feet.

Q. Handing you now 26, you saw it before you reached that point, didn't you? A. Yes.

Q. Huh? A. Yes.

Q. Now, if I am mistaken, did you testify that this bucking that you saw happened as you came out through the viaduct or just before you got into it?

A. I was about under the viaduct. I can't tell you just [292] exactly because everything was pin pointed on this truck approaching. A fireman and engineer, when he has cars, trucks and what have you, approaching crossings like that, your attention is all diverted to that one particular object,

(Testimony of Francis William Scobee.)

and to tell you just exactly—I knew I was coming close under the viaduct.

Q. You were coming close under the viaduct?

A. And this emergency came up, and my fireman, he jumped up and started blowing the whistle after I had to leave the whistle and go for the air.

Q. All right, when did you start? The car was bucking, but it wasn't on the tracks, is that the idea?

A. It hadn't got up to the track right now when it started bucking, but it bucked its way up onto the track.

Q. All right, where was the train situated from the crossing, from the car? You were pin pointed on the car, weren't you?

A. I had my eyes pin pointed on the car, yes.

Q. How far away were you from it when the car got on the crossing.

A. Around the viaduct.

Q. Beg your pardon?

A. I was around the viaduct with my engine.

Q. When the car got right on the crossing?

A. Well, I was going under the viaduct about that time, right around the viaduct. [293]

Q. In other words, if I understand your testimony correct, you were going right under the viaduct, you were right about at the viaduct, when the car bucked right onto the track at the crossing?

A. Right about that point.

Q. Right about that point?

(Testimony of Francis William Scobee.)

A. Close to it.

Q. Calling your attention to the Defendant's Exhibit No. 26, talking about that point, would it have been west, just west on the west pier, or would it be right there (indicating), do you think, when you saw the car buck right up onto the crossing?

A. I couldn't tell positively, because my attention was diverted mostly to the truck. I couldn't tell you, pin point down the footage there, just how close I was to the truck.

Q. No, but all I am trying to ask you, do you think you were out the other side of it or on this side of the viaduct? You knew you were at the viaduct.

A. I was at the viaduct, but to tell you just how far, I couldn't tell you.

Q. All right.

A. Because my attraction was on this car.

Q. Would it be fair, then, to both of us to say you were [294] right about the middle of the viaduct? A. Well, close to it.

Q. All right. And that is when the car bucked out to the track?

A. It bucked its way onto the track, yes.

Q. All right. So then you were right under the viaduct, what did you do when the car bucked right out on the track?

A. Well, I had already released the air when I saw the truck approach.

Q. Beg your pardon?

A. When I saw the car approach the crossing,

(Testimony of Francis William Scobee.)

it come out from behind this pier up to the crossing, and I had a feeling that they might try to go across so I set some air, how much I don't know. But I had set an amount of air and it was just one of those things of slowing down in case, and when it bucked, when it come up to the crossing, it momentarily stopped. Well, that was a relief to me, I released the air.

Q. All right.

A. Well, the next thing that come up, the truck started bucking its way up there on the track.

Q. All right, the air was released at the time the car bucked up on the track and you were under the viaduct? A. That's right. [295]

Q. In other words, you had no air on when you were under the viaduct, but the car then bucked up to the track and you had just released the air?

A. I had released the air.

Q. All right, what did you do when you saw it go right up on the track?

A. That is when I had to go into emergency.

Mr. McKevitt: You what?

A. I had to take and put the train into emergency when the truck went on the track.

Q. (By Mr. Etter): You put it in emergency?

A. Yes.

Q. All right. What did you do? Tell us now just exactly what you did.

A. What I did was have to sit there, because that is all I could do was put the train in emer-

(Testimony of Francis William Scobee.)

gency. That dumped all my reservoirs into the train line.

Q. No, but tell me just what you did. I want you to tell whether you pulled the throttle all the way back.

A. Well, I had ahold of the whistle.

Q. All right.

A. And then when I went to set this amount of air to make a slow down, I let go of the whistle, and this fireman of mine had fortitude enough to jump up and grab the whistle himself in a standing position, and I was [296] setting the air with my right hand and starting to shut the throttle down with my left hand when she momentarily paused at the crossing. When she momentarily made that pause, I reached up with my right hand and set the air back in a normal position on the brake valve.

Q. The thing I am trying to get at now, when you were under the overpass, when you were under the overpass, that is when the girl's car got out on the crossing, is it not? A. That's right.

Q. When you were under the overpass?

A. I was just going under the overpass or right around that area.

Q. That's right, and that car was out on the crossing in front of you directly astraddle the crossing? A. Just about there, yes.

Q. Isn't that right? And that is when you put on the emergency application?

A. That's right.

(Testimony of Francis William Scobee.)

Q. And in doing that, did you pull the throttle or push the throttle all the way back off?

A. I had to shut it all the way.

Q. Did you take the air and pull it all the way out? A. That's right.

Q. That would be just under the viaduct? [297]

A. It could be just a few feet beyond the viaduct.

Q. That is what I mean.

A. I can't pin point right down, because them things, you don't see those things. Those emergencies come up and you can't pin point nothing down like that.

Q. That's correct.

A. All I did was went into emergency.

Q. Went into emergency, but I say you pushed the throttle all the way off and pulled the air all the way on, either at the viaduct or 50 feet beyond it toward——

A. It is around that area somewhere.

Q. All right, you gave it full emergency?

A. That's right.

Q. All right. Then tell us what happened.

A. We hit the truck, moved on up the track until the train stopped, I figure about, oh, 1,500 feet, something like that.

Q. Well, now, how far, after your train stopped, how far was the rear end of your train from that crossing?

Mr. McKevitt: If you know.

Mr. Etter: If you know.

(Testimony of Francis William Scobee.)

A. I really don't know. We just took a walk up that way to the front end where the truck was still draped on the front end of our engine, where the impact was, and we figured about 1,600 feet at that time. [298]

Q. To the crossing, back to the crossing?

A. To the crossing, yes.

Mr. McKevitt: From the pilot?

A. From the pilot where the truck was still on the pilot. But as far as the rear end of the train goes, I didn't measure that distance there. I just walked it off.

Q. (By Mr. Etter): If your train was 700 feet long, giving it an extra car and the longest lengths that you gave me, if your train was 700 feet long and you paced 1,600 feet back, it was approximately 900 feet from the crossing, the rear end of your train, wasn't it?

A. Approximately, if it was that far.

Q. Yes. And you had applied your emergency just under the viaduct or possibly 30 or 50 feet beyond it, isn't that right.

A. I don't know how much footage there was in there, but it was just around that place in there.

Q. So where you applied your full emergency, that is, just through the viaduct, where you applied your full emergency, you went the distance from where you applied your emergency down to the crossing, hit the car, and took the car on down 1,600 feet on the front of your locomotive?

(Testimony of Francis William Scobee.)

A. I can't tell just how close I was. I knew I was around the viaduct when I dynamited my train, but I couldn't tell you how—— [299]

Q. That is what I mean.

Mr. McKevitt: Let him finish his answer.

Q. (By Mr. Etter): I am saying you were in the area of the viaduct, you were under it or you were 50 feet beyond or maybe you were 75, but you were right close under the viaduct, I am going with you on that; is that right?

A. Well, sir, I can't pin point a certain amount of feet when an emergency comes up. You don't look at the terrain around you and tell just exactly where you was at. An emergency come up, my eyes are pinned on this trouble, this automobile in front of me on the track. I can't pin point a certain amount of feet and distance.

Q. I'm not asking you to, I'm merely asking if you weren't in that area right by the viaduct or close thereto?

A. It was close to, but I couldn't tell you in amount of feet.

Q. That's right, and then you paced off from the front end of your train back to the grade crossing, it was 1,600 feet?

A. We just walked it off and I just figured about how much.

Q. Figured about how much?

A. That is from the crossing to the front end of my engine where the truck was. [300]

Q. Taking your figure of 1,600 feet and going

(Testimony of Francis William Scobee.)

back up to that general area near the viaduct somewhere where you pulled on your full emergency, the total number of feet that you traveled in that train after you put it on full emergency——

Mr. McKevitt: That is objected to as being argumentative. The witness can tell distances, and so on, and his best opinion.

The Court: Let's have the question.

(The question was read.)

The Court: He may answer that question.

A. Well, in that question, I don't know where exactly, how many feet east of the crossing I put it in emergency, so I couldn't truthfully add up the amount of distance I had traveled after I went in emergency.

Q. (By Mr. Etter): After you put it in emergency, did you keep your eyes glued on the car?

A. Had to, that is the main attraction there.

Q. All right, what did you see, if anything?

A. Well, just as the car went—the truck went out of sight from me in front of the Diesel—of course, I am in a sitting position and I can see down a ways—I saw the head come out of the car door, and that is the last I saw when we hit. [301]

Q. What was that again, now?

A. I saw a head come out of the door, doorway, on the left-hand side.

Q. A head come out of the door?

A. Yes.

Q. At what point was that?

A. I couldn't tell you how close I was. I was in

(Testimony of Francis William Scobee.)

a sitting position just before the truck went out of sight from me in front of the engine. That is the last I saw, was this head coming out, open the door, and this head coming out.

Q. It would only be six or eight feet, isn't that right?

A. Well, I couldn't pin point that, either, because, see, sir, you are sitting up high.

Q. I know it.

A. You are sitting up high and in a sitting position, like I am now. Sitting up high, you couldn't tell whether you raised yourself up at the same time or you lowered yourself when you are going to hit an object sitting in front of a glass like I am on a Diesel. I might have even ducked for flying parts or something like that, I couldn't tell you, but the last thing I remember before we hit was this head coming out of this car door.

Q. You didn't duck, though? [302]

A. Yes, I ducked, just as we hit.

Q. Just as you hit? A. Yes.

Q. Well, now, you have sat in that Diesel since, isn't that right? A. Quite a few times.

Mr. McKevitt: I didn't get the question?

(The question was read.)

Q. (By Mr. Etter): Isn't it a fact that you can look down from that Diesel and see anything that is 15 feet in front of you?

A. Oh, if you raise up, yes, sometimes.

Q. No, but I mean in a natural sitting position, isn't it a fact that you can see anything that is 15 feet in front of the Diesel?

(Testimony of Francis William Scobee.)

A. If you are looking right straight over the nose?

Q. If you look over the nose, yes?

A. In front footage, I never measured it off or anything, but it is fairly close.

Q. And, in other words, just before you hit, you saw this head come out of the window or out of the door?

A. I saw the door open and the head come out.

Q. And the head come out?

A. And that is the last I saw before the truck and everything went out of sight from me in front of the Diesel. [303]

Q. Right after the accident happened, Mr. Scobee, what did you do?

A. After the accident happened?

Q. Yes?

A. Well, the fireman and I both climbed off the engine and, of course, there was a strong smell of gas——

Q. Yes?

A. And being a truck and a panel truck, the first thing we thought, there might be more people in it in the back end of the truck, that is, so we took the fire extinguisher down with us and sprayed on the motor so in case a fire would start. And we walked out away from the engine and looked back and there was a fellow standing on the crossing and he had pretty near the same clothes on as this shirt the fireman was talking about he had seen, because the fireman was in a standing position, he

(Testimony of Francis William Scobee.)

got to see this shirt that she had had on. It was—I don't know—a man's shirt, checkered shirt of some kind, and we thought they had escaped out of the wreck.

Q. I see. Then what did you do?

A. We walked back then to see if anybody was hurt, and, of course, we found these lady's shoes at the crossing and then we started to realize that it must have been a girl that was hurt. So then we walked up the track, [304] oh, we figured about 75 feet up the track and about 10 feet off the outside rail, then we found the girl.

Q. All right.

Mr. McKevitt: This is west of the crossing?

A. That is west of the crossing, yes.

Q. (By Mr. Etter): All right, and then will you tell us, did you talk to anybody there at the time?

A. Well, there was—I don't know, the coroner and then there was state police, they called some more in, and I guess it was a city coroner or the county coroner of Kittitas County, and Mr. Dorsey, I think he is the County Sheriff.

Mr. McKevitt: Keep your voice up.

A. Mr. Dorsey, the County Sheriff.

Mr. McKevitt: Oh, yes.

A. Of Kittitas County, I believe. And I don't know who the other fellows was. There was quite a few of them asking questions.

Q. (By Mr. Etter): Did you talk with Sgt. Carriger of the State Patrol?

(Testimony of Francis William Scobee.)

A. I don't know their names.

Q. Beg your pardon?

A. I didn't know their names. There was a couple of state police there.

Q. Did you talk with them? [305]

A. I didn't know his name.

Q. Beg your pardon?

A. I didn't know his name.

Q. No, but did you talk with him?

A. Yes, they was asking me lots of questions.

Q. All right. What did you tell the Sergeant?

A. I couldn't tell you.

Q. Beg your pardon?

A. I couldn't tell you, at that time.

Q. Do you remember that you told Sgt. Carriger that you saw the truck or that you put on your application, put on your emergency brakes, about 100 feet from the crossing?

A. I couldn't remember that.

Q. Do you remember that you told him that?

A. No.

Mr. McKevitt: Well, now, I object to the way this question is put. If it is for the purpose of impeachment, I think he ought to ask him if he told that, instead of counsel saying, "Don't you remember you told him that?" It is a bald assumption that he did and I object to the form of the question.

Q. (By Mr. Etter): Well, all right, did you tell him that?

A. I don't know. I don't think, I don't remember. That is two years ago. [306]

(Testimony of Francis William Scobee.)

Q. What did you tell him?

A. I don't know. I don't know whether I even talked to him or not. I know I talked to the state patrolmen. There was two or three of them around. Traffic was thick on the highway and they had to call out some patrolmen from the city to come down there and help get that traffic on the highway moving, and there was a lot of people milling around there and I was talking to them and they was asking me questions and I was answering. I don't know what I said.

Q. Did you tell the Sergeant that as you slipped through the viaduct, you saw a light truck stalled on the crossing with a girl in it, apparently trying to restart the truck?

A. I don't remember of ever saying anything like that.

Q. Beg your pardon?

A. I don't remember ever saying anything like that.

Q. You don't remember saying it?

A. No.

Q. I see. Did you tell the Sergeant at that time, that as you approached the overpass, that you saw the car 25 feet south of it?

A. I don't remember.

Mr. McKevitt: I object to this unless he identifies to the witness, if your Honor pleases, who this Sergeant is, [307] and there might have been three or four sergeants there.

The Court: I think first we should have the per-

(**Testimony of Francis William Scobee.**)

son he claimed he talked to and the time and place.

Q. (By Mr. Etter): All right, immediately after the accident, did you talk to a state patrolman?

A. Yes, I talked to some patrolmen, but I don't know who they were.

Q. You don't know who they were. Did they tell you who they were? A. I don't remember.

Q. Sergeants Carriger and Stanley?

A. I don't remember.

Q. They were two state patrolmen.

A. There was two or three of them around there. There was a lot of traffic and everything, they had to call out some more.

Q. And did you talk with those two patrolmen, state patrolmen, after that accident when they came out?

A. There was patrolmen there, yes, and I was talking to them, but what I said, I don't remember.

Q. I will ask you, did you say to these two state patrolmen that you applied the brakes 100 feet from the crossing? A. I don't remember.

Q. Did you tell the state patrolmen that when you saw the car, you slowed the train down but you did not attempt [308] to dynamite the brakes?

A. No, sir.

Q. Beg your pardon?

A. I don't remember telling anybody anything like that.

Q. Did you tell Mr. W. R. Cole?

A. I don't remember anything like that.

(Testimony of Francis William Scobee.)

Q. Do you know the Sheriff of Kittitas County?

A. No.

Q. Did you tell the state patrolmen that you saw the girl trying to push the car off the crossing?

A. No, sir.

Q. Did you tell anybody that?

A. No, sir.

Q. Did you tell the state patrolmen, these two state patrolmen, that you saw the girl or saw the truck when the girl was about 25 feet from the crossing?

A. No, I don't remember what I told them.

Q. Do you remember whether you told them that or not? A. I don't remember.

Q. All right. Did you tell the two state patrolmen that as you came through the viaduct, the car you saw started to jerk, it started jerking before it went on the crossing?

A. I might have, I don't remember.

Q. Do you remember whether you did or whether you did not? [309]

A. I don't remember.

Q. I see. Did you tell them that you saw the girl in the car trying to start it?

A. I don't remember that, either.

Q. You don't?

A. I don't remember the conversation with them fellows. That is two years ago.

Q. Well, isn't it a fact that the first time that you told anybody about the car jerking when it approached the crossing and that you saw it 25 feet

(Testimony of Francis William Scobee.)

from the crossing, is right here in this courtroom?

A. I have told Mr. Etter about it — I mean Mr.——

Mr. McKevitt: McKevitt.

A. McKevitt and Mr. Thomas.

Q. (By Mr. Etter): When did you tell them about it?

A. That was here Sunday night or Sunday morning.

Q. Sunday morning? A. Yes.

Q. All right.

A. First time I seen them.

Q. All right, up until Sunday morning or Saturday night when you talked to Mr. Thomas and Mr. McKevitt, had you ever told anybody the same story you have told here about your seeing the car 25 feet from the crossing and then seeing it jerk up on the crossing? Have [310] you ever told that to anybody?

A. Well, the claim agent, I suppose.

Q. When?

A. Well, right after—no, I don't—I don't remember that part of it there. That is something that I can't pin point down just where I first told anybody about it. If it was at the scene, I can't remember what I talked with them fellows about, but I know in my own mind just what happened.

Q. You never told any investigating officer that, did you, now?

A. Well, I couldn't tell you just exactly what I told them fellows at the scene two years ago.

(Testimony of Francis William Scobee.)

Q. But I am asking you this, you did not tell them that? A. I might have.

Q. Huh?

A. I might have. But I can't pin point it down, because I don't know who they was and I don't know just what I said because that was two years ago and I can't remember what I said then.

Q. Did you see the occupant of the car other than her head coming out of the door?

A. Just got the image through the glass as it was bucking up onto the track.

Q. I see. [311]

A. And then the head coming out of the car door. As far as the other features, I don't know.

Q. Did you see a checkered shirt on the girl?

A. In the car window, as it was bucking up on the track, just got an image of the shirt that she was wearing. What color it was, I couldn't tell you. I knew it was a checkered shirt.

Q. You knew that it was checkered?

A. Yes.

Q. When did you see that checkered shirt?

Q. Just as the truck was bucking up on the track.

Q. Beg your pardon?

A. I had my eyes pin pointed on the person and the truck as it was bucking up on the track, and I could tell it was a checkered shirt and I didn't know whether it was a man or woman in the truck.

Q. I see. And you were able to see that from your

(Testimony of Francis William Scobee.)

position somewhere near the viaduct when you put on the full emergency?

A. Just around that area.

Q. Just around that area?

A. I couldn't tell you how far it was away.

Q. I am handing you the Defendant's Exhibit No. 23, which is a picture, you know, the inscription here, 400 feet east of the crossing facing westward.

A. Uh-huh.

Q. Do you see that crossing?

Mr. McKevitt: What is the number, Max, 20 what?

Mr. Etter: 23.

Q. You see the crossing down here (indicating)?

A. Uh-huh.

Q. And, of course, this picture was taken approximately 150 feet, more or less, west of the viaduct. Were you at that point, approximately, do you think, when you saw the checkered shirt on the girl in the car up here?

A. It could be near there.

Q. It could be near there?

A. Right around that point, yes. I couldn't pin point it down, no.

Q. Right around that point. Have you any idea of the speed of your train just after the collision with this car at the crossing?

A. Only afterwards.

Q. Only afterwards? A. Yes.

Q. How soon afterwards?

A. Well, I had reached that speed of about 60

(Testimony of Francis William Scobee.)

miles an hour before I started blowing the whistle, and there I couldn't tell you what the speed was until the tape on the engine was checked. [313]

Q. Where was that, after the accident?

A. Seattle, Washington.

Q. No, but what I want to know is did you check your speed shortly after you hit the car at the crossing? A. No.

Q. Do you know what speed you were traveling?

A. No, I don't.

Q. Beg your pardon?

A. Only when I checked the tape, is all. They checked the tape in Seattle when I arrived.

Q. They checked the tape?

A. Our speed recorders have teletypes on them.

Q. Yes.

A. And they show each mile, each inch, pretty near, of your track, and this is registered on a tape along with the speedometer and it shows your various speeds. And the only way I could tell was when I arrived in Seattle, and we don't have no way of getting into them, they are padlocked or locked.

Mr. McKevitt: It is what?

A. These tapes, recorders, are locked and we have no way of getting into them. There is only one man at the station, at the roundhouse, and he takes the tapes out and that is the first—

Q. (By Mr. Etter): You don't know, then, independently, [314] what your speed was?

(Testimony of Francis William Scobee.)

A. Independently, I don't know what speed I was going at.

Mr. Etter: That is all.

Mr. McKevitt: No questions.

The Court: That is all, then.

The Witness: Is that all with me?

The Court: Yes.

Mr. McKevitt: Wait a moment, I think Mr. Etter has something else.

Mr. Etter: Just one or two questions.

The Court: Oh.

Q. (By Mr. Etter): Do you know Mr. Pontice?

A. Mr. who?

Q. Mr. Pontice from Ellensburg?

A. I have seen him a lot of times, I just met him.

Q. Beg pardon?

A. I just met him.

Q. When did you meet him?

A. Here at this courtroom.

Q. You have never seen him before?

A. Oh, I have seen him, yes.

Q. When?

A. Oh, going by on the train. He used to work at Ellensburg.

Q. He used to work in Ellensburg? [315]

A. Yes.

Q. Have you ever talked to him before you have seen him in the courtroom?

A. Well, casually, I might have talked if he

(Testimony of Francis William Scobee.)

was stopped at the siding. As far as knowing him by name, I didn't know him.

Q. But you have talked to him?

A. Yes.

Q. A number of times?

A. Oh, maybe a few times.

Q. Have you ever talked to him about this accident?

A. No.

Q. Did he ever talk to you about it?

A. No.

Q. Never discussed it?

A. The only time I just met him here at this trial.

Mr. Etter: All right, that is all.

Mr. McKevitt: That is all.

(Witness excused.)

Mr. Connelly: Call John O'Neill, please. [316]

JOHN J. O'NEILL

called and sworn as a witness on behalf of the plaintiff, was examined and testified as follows:

Direct Examination

Q. (By Mr. Connelly): Will you give us your full name, please, Mr. O'Neill?

A. John J. O'Neill, John Joseph O'Neill.

Q. John Joseph O'Neill? A. Yes.

Q. Where do you live, sir?

A. Ellensburg, Route 1.

Q. And is that somewhat outside the city proper?

A. About a mile and a quarter out.

Q. Are you a married man, Mr. O'Neill?

(Testimony of John J. O'Neill.)

A. Yes.

Q. Do you have a family?

A. Yes, sir.

Q. How many children do you have?

A. Four.

Mr. McKevitt: How many?

A. Three boys and one girl.

Q. (By Mr. Connelly): Are they all living at home with you?

A. Not now, there is two. [317]

Q. Who are the two that remain?

A. Larry and Mick.

Q. Larry and Mick? A. Yes.

Q. Which of those two boys is the older?

A. Larry.

Q. How old a boy is Larry? A. 16.

Q. About how long have you lived around Elensburg, Mr. O'Neill? A. 45 years.

Q. You and your father before you, apparently?

A. Yes, sir.

Q. Do you have some brothers who live in the same general area that you live?

A. Yes, sir, two of them.

Q. What are their names?

A. Leo and Arthur.

Q. Where does Arthur live?

A. Well, he is about a mile, about two miles west of me.

Q. Two miles west of you? A. Yes.

Q. Where does Leo live?

(Testimony of John J. O'Neill.)

A. Well, he lives right by this crossing, right along the railroad, the highway. [318]

Q. Does Leo live at the old home place?

A. That's right.

Q. Have you had occasion to take a look at this map or sketch that has been put up here, Mr. O'Neill? A. I did this morning, yes.

Q. And does Leo O'Neill's house appear on that sketch or the old family place? A. Yes.

Q. I don't know whether it is necessary for you to come all the way down to this, but if you can see what I am pointing at is this square here indicates Leo O'Neill's home.

A. That is close.

Q. That is pretty close?

A. Pretty close.

Q. And this is generally the road running, according to the map, east and west on the section line? A. Yes, that's right.

Mr. McKevitt: Keep your voice up, John, please, so we can hear you.

Q. (By Mr. Connelly): And down here is what they call O'Neill crossing. (Indicating).

A. That's right.

Q. This is O'Neill Road.

A. That is O'Neill Road. [319]

Q. This is the O'Neill crossing.

A. That's right.

Q. Here the road turns and runs south 90 degrees down the other section line.

A. That's right.